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THE UNITED STATES AND PEACE

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BY

WILLIAM H. TAFT

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FOREWORD

EVERY President of the United States can be quoted in favor of peace. From the first great Virginian to the last all have abhorred what Thomas Jefferson called "the greatest scourge of mankind."

No President, however, has espoused the cause more unreservedly, has grasped its fundamental principles more thoroughly or attempted to advance its progress more directly than has Mr. Taft. This book is a demonstration of the fact.

Mr. Taft has occupied the greatest political office in the world. He has presided over a confederation of nearly half a hundred sovereign States—the greatest peace society known to history and a living example to the nations of the earth of

the way to obtain peace through political organization. Peace is the outcome of justice, justice of law, law of political organization. Emanuel Kant proclaimed this as the true philosophy of peace, when in 1795 he wrote: We never can have universal peace until the world is politically organized, and it will never be possible to organize the world politically until the people, not the kings, rule.

Peace hath her victories no less renowned than war. Perhaps the greatest victory yet achieved is the declaration of Mr. Taft, as President of the United States, that he was willing to refer all questions, even those involving national honor, to arbitration. He attempted to negotiate treaties to this end with Great Britain and France. His hope was that the example thus afforded would be followed by other nations, until a general treaty could be formulated in which the peoples of the earth would agree to refer all their dis-

putes to a court of arbitral justice. This would be the doom of war.

The attempt, though thwarted by the United States Senate, offers the nations a guiding principle which they will support with an ever-increasing favor and fervor until it is made a universal law. Mr. Taft's high statesmanship has inaugurated a movement that will not end until, as Victor Hugo prophesied, "the only battle-field will be the market opening to commerce and the mind opening to new ideas."

The present volume is the outcome of a suggestion made to Mr. Taft by the New York Peace Society, which has started so many good movements to further international progress and comity. Its four chapters were delivered last winter as lectures under the auspices of the Society. They were also published as contributions to *The Independent*. A special importance attaches to them in the fact that

they were prepared by one who has been a supreme and responsible leader in national and international politics. Thus the age-long dreams of the poets, prophets and philosophers have at last entered the realm of practical statesmanship.

The first chapter deals with the Monroe Doctrine. This constitutes altogether the most important foreign policy of the United States. The second chapter discusses the status of aliens under the conflicting jurisdiction of the Federal and State Governments. This involves our chief danger of war. The third chapter completely refutes the claim of the Senate that it has no power to consent to general arbitration treaties. This, if persisted in, will block all further participation of the United States in the movement for extending the scope of arbitration. The fourth chapter elucidates the history and conception of a world federation in which is emphasized a court of judicial ar-

bitration with jurisdiction of all disputes —"the highest court of appeals this side the bar of Eternal Justice." Its realization is only a matter of decades.

The one way for a man to rise above the presidency of the United States is to ascend into the international realm and there work for peace through justice. Mr. Taft has taken this upward step. This book is a Declaration of Interdependence.

HAMILTON HOLT.

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CHAPTER I

THE MONROE DOCTRINE: ITS LIMITATIONS AND IMPLICATIONS

It is now ninety years since what the world has always called the Monroe Doctrine was announced by President Monroe in a message to Congress. It was a declaration to the world that any effort on the part of an European government to force its political system upon a people of this hemisphere, or to oppress it, would affect the safety of the United States and would be inimical to her interests, and, further, that the subjecting to colonization by any European government of any part of the two American continents, all

of which was held to be within the lawful jurisdiction of some government, would be equally objectionable. The first part of the declaration was prompted by the fear that the then Holy Alliance of Russia, Prussia, Austria, and France would attempt to assist Spain in reconquering the Central and South American republics that had revolted from Spain and set up independent governments which had been recognized by the United States. The other part, against colonization, was prompted by certain claims that Russia was making to control over territory on the northwest coast of North America to which the United States then asserted title. There was expressly excepted from the doctrine thus announced any purpose to interfere with Spain's effort to regain her lost colonies or the continued exercise of jurisdiction by European governments over any colonies or territories which they then had in America.

I have not space to give the details of the instances in which our Presidents, representing our country in its foreign relations, found it necessary to insist upon compliance with the Monroe Doctrine. When Mr. Webster was secretary of state, he declined, in Mr. Tyler's name, to consider a proposition by England and France for a joint agreement with Spain as to the disposition of Cuba, stating that, while the United States did not intend to interfere with the control of Cuba by Spain, it could not consent to the ownership of the island by any other power. Again, when Yucatan had been temporarily separated from Mexico by insurrection, and the insurrecto leaders sought to dispose of the country to us, or to England, or to Spain, President Polk, in declining their offer to the United States, advised them that we could not consent to a transfer of dominion and sovereignty either to Spain, Great Britain, or any

other power, because "dangerous to our peace and safety."

Without directly citing the Monroe Doctrine by name, Mr. Seward protested against the occupation of Mexico by France during the Civil War with the purpose of colonizing or setting up a new government on the ruins of the Mexican Government. France denied having any other purpose than to collect its debts and redress its wrongs. Afterward the Mexican Government was overthrown and an empire established with an Austrian archduke at its head. The American Civil War closed, the American troops were massed on the Mexican border under Sheridan, and France was requested to withdraw her troops. She did so, and the collapse of the Maximilian government followed.

President Grant, in sending the Santo Domingo treaty to the Senate, announced that thereafter no territory on the conti-

nent should be regarded as subject to transfer to an European power, and that this was an adherence to the Monroe Doctrine as a measure of national protection.

Again, the policy was insisted upon and maintained by Mr. Olney and Mr. Cleveland in reference to England's declination to arbitrate the boundary issue between Venezuela and British Guiana, in which Mr. Cleveland and Mr. Olney believed that they saw a desire on the part of Great Britain, through a boundary dispute, to sequester a considerable part of Venezuela, valuable because of the discovery of gold-mines in it. Mr. Cleveland's position in the matter was sustained by a resolution which was passed by both houses. In this instance Mr. Olney used the expression:

> To-day the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition.

The original declaration of the Monroe Doctrine was prompted by England's wish, when Canning was foreign minister, that England and the United States should make a joint declaration of such a policy. Since its announcement by President Monroe there have been frequent intimations by English statesmen while in office that they do not object to its maintenance. Whether the other governments of Europe have acquiesced in it or not, it is certain that none of them have insisted upon violating it when the matter was called to their attention by the United States. Every one admits that its maintenance until recently has made for the peace of the world, has kept European governments from intermeddling in the politics of this hemisphere, and has enabled all the various Latin-American republics that were offshoots from Spain to maintain their own governments and their independence. While it

may be truly said that it has not made for peace between them, still, that was not within the scope of its purpose. It has, however, restrained the land-hunger and the growing disposition for colonization by some European governments which otherwise would certainly have carried them into this hemisphere. The very revolutions and instabilities of many of the Latin-American republics would have offered frequent excuse and opportunity for intervention by European governments which they would have promptly improved.

But now we are told that under changed conditions the Monroe Doctrine has become an obsolete shibboleth, that it promotes friction with our Latin-American neighbors, and that it is time for us to abandon it. It is said that it is an assertion of a suzerainty by the United States over both continents; that it seeks to keep under the tutelage of the United

States great and powerful nations like the Argentine Republic, Brazil, and Chile; that its continuance as a declared policy of this government alienates these and other republics of South America, injures their proper national pride, creates a resentment against us which interferes with our trade relations, and does not promote the friendly feeling that strengthens the cause of peace.

Before we proceed to consider this proposition we ought to make clear certain definite limitations of the Monroe policy that are not always given weight by those who condemn it. In the first place, the Monroe Doctrine is a policy of the United States and is not an obligation of international law binding upon any of the countries affected, either the European countries whose action it seeks to limit or the countries whose government and territory it seeks to protect. Nor, indeed, does it create an absolute

obligation on the part of the United States to enforce it. It rests primarily upon the danger to the interest and safety of the United States, and, therefore, the nearer to her boundaries the attempted violation of the doctrine, the more directly her safety is affected and the more acute her interest, and, naturally, therefore, the more extreme will be the measures to which she would resort to enforce it. While the assertion of the doctrine covers both continents, the measures of the United States in objecting to an invasion of the policy might be much less emphatic in the case where it was attempted in countries as remote as Argentina, Brazil, and Chile than in the countries surrounding the Caribbean Sea, or brought close to the United States by the opening of the Panama Canal. It is well that the declared policy has in the past covered both continents, because this certainly contributed to the causes which

made Argentina, Brazil, and Chile the powerful countries they have become. But, as Daniel Webster said in Congress in 1826, speaking of the plans of the Holy Alliance:

> If an armament had been furnished by the allies to act against provinces the most remote from us, as Chile or Buenos Ayres, the distance of the scene of action diminishing our apprehension of danger, and diminishing also our means of effectual interposition, might still have left us to content ourselves with remonstrance. But a very different case would have arisen if an army equipped and maintained by these powers had been landed on the shores of the Gulf of Mexico and commenced the war in our own immediate neighborhood. Such an event might justly be regarded as dangerous to ourselves, and on that ground call for decided and immediate interference by us.

In other words, the extent of our intervention to enforce the policy is a matter of our own judgment, with a notice that it may cover all America. It therefore follows that the Monroe Doctrine, so far

as it applies to Argentina, Brazil, and Chile, the so-called A B C governments of South America, is now never likely to be pressed, first because they have reached such a point that they are able to protect themselves against any European interference, and, second, because they are so remote from us that a violation of the doctrine with respect to them would be little harmful to our interests and safety.

The second great limitation of the Monroe Doctrine is that it does not contemplate any interference on our part with the right of an European government to declare and make war upon any American government, or to pursue such course in the vindication of its national rights as would be a proper method under the rules of international law. This was expressly declared to be a proper term in the statement of the Doctrine by Mr. Seward during our Civil War, when Spain

made war against Chile. He announced our intention to observe neutrality between the two nations, and he laid down the proposition that the Doctrine did not require the United States, in a consistent pursuit of it, to protect any government in this hemisphere, either by a defensive alliance against the attacking European power or by interfering to prevent such punishment as it might inflict, provided only that in the end the conquering power did not force its own government upon the conquered people, or compel a permanent transfer to it of their territory, or resort to any other unjustly oppressive measures against them. And Mr. Roosevelt, in his communications to Congress, has again and again asserted that maintenance of the Doctrine does not require our government to object to armed measures on the part of European governments to collect their debts and the debts of their nationals against gov-

ernments in this continent that are in default of their just obligations, provided only that they do not attempt to satisfy those obligations by taking over to themselves ownership and possession of the territory of the debtor governments or by other oppressive measures. It may be conceded that Mr. Olney used language that was unfortunate in describing the effect of the Monroe Doctrine upon the position of the United States in this hemisphere. It is not remarkable that it has been construed to be the claim of suzerainty over the territory of the two American continents. Our fiat is not law to control the domestic concerns or, indeed, the foreign policies of the Latin-American republics or of other American governments, nor do we exercise substantial sovereignty over them. We are concerned that their governments shall not be interfered with by European governments; we are concerned that this hemisphere shall

not be a field for land aggrandizement and the chase for increased political power by European governments, such as we have witnessed in Africa and in China and Manchuria, and we believe that such a condition would be inimical to our safety and interests. More than this, where a controversy between an European government and a Latin-American republic is of such a character that it is likely to lead to war, we feel that our earnest desire to escape the possible result against which the Monroe Doctrine is aimed is sufficient to justify our mediating between the European power and the Latin-American republic, and bringing about by negotiation, if possible, a peaceable settlement of the difference. This is what Mr. Roosevelt did in Venezuela and in Santo Domingo. It was not that the use of force or threatened force to collect their debts by the European powers constituted a violation of the Monroe Doctrine that induced Mr.

Roosevelt to act, but only a general desire to promote peace and also a wish to avoid circumstances in which an invasion of the Monroe Doctrine might easily follow.

It is said—and this is what frightens peace advocates from the Monroe Doctrine—that it rests on force and ultimately on the strength of our army and our navy. That is true, if its enforcement is resisted. Its ultimate sanction and vindication are in our ability to maintain it; but our constant upholding and assertion of the Doctrine have enabled us, with the conflicting interests of European powers—the support of some and the acquiescence of others—to give effect to the Doctrine for now nearly a century, and that without the firing of a single shot. This has secured the Doctrine a traditional weight that assertion of a new policy by the United States never could have. It is a national asset,

and, indeed, an asset of the highest value for those who would promote the peace of the world. The mere fact that the further successful maintenance of the Monroe Doctrine, in the improbable event that any European power shall deliberately violate it, will require the exercise of force upon our part is certainly not a reason for the most sincere advocate of peace to insist upon sacrificing its beneficent influence and prestige as an instrument of peace to prevent European intermeddling in this hemisphere which a century of successful insistence without actual use of force has given it.

Much as the Doctrine may be criticised by the Continental press of Europe, it is an institution of one hundred years' standing; it is something that its age is bound to make Europe respect. It was advanced at a time when we were but a small nation with little power, and it has acquired additional force and pres-

tige as we have grown to our present size and strength and international influence.

Were we to abandon the Doctrine and thus, in effect, notify the European governments that, so far as our remonstrance or interposition was concerned, they might take possession of Santo Domingo, of Haiti, or of any of the Central American republics, or of any South American republics that might be disturbed by revolution and that might give them some international excuse for intervention, it would be but a very short time before we would be forced into controversies that would be much more dangerous to the peace of this hemisphere than our continued assertion of the Doctrine properly understood and limited.

I fully sympathize with the desire to make such countries as the Argentine Republic, Brazil, Chile, and other powers in South America that are acquiring stability and maintaining law and order

within their boundaries, understand that we do not claim to exercise over them any suzerainty at all and that we are not tendering our guardianship as if they were children or as if they needed it. We reserve to ourselves the right, should oppression or injustice be manifested in a warlike way by any of the European countries against them, and should they be unfortunate enough not to be able to give effective resistance, to determine whether it is not in our own interest to intervene and prevent an overturning of their government or an appropriation of their territory. But we recognize that this possibility is so remote that it practically removes them from the operation of the Monroe Doctrine. I am glad to see that Mr. Roosevelt, in his visit to those countries, has sought to impress them with the same view of the Monroe Doctrine that I have thus expressed. Indeed, he would have helped them, and

us, too, far more if he had confined his teachings and lectures to explanations and limitations of the Monroe Doctrine and had not sought to destroy the independence of the judiciary and demoralize the administration of justice in two continents.

But it is said that we ought to invite in these so-called A B C powers of South America to assist us in upholding the Doctrine and also in doing what the Doctrine, as well as neighborhood interests, may lead us to do with near-by countries around the Gulf of Mexico and the Caribbean Sea. It is suggested that we ought to establish some sort of relationship with these great powers as members of a kind of hegemony to decide upon Latin-American questions and participate in intervention to help along the smaller countries, and thus put such powers on an equality with us in our American policy and give assurance of our disinterested-

ness. If we could do this I would be glad to have it done, because it would relieve us of part of a burden and would give greater weight to the declaration of the policy. I would be glad to have an effort tactfully made to this end and I don't want to discourage it; but I fear we should find that these Powers would be loath to assume responsibility or burden in the matter of the welfare of a government like one of the Central American republics, or Haiti or Santo Domingo so remote from them and so near to us. We attempted, in case of disturbance in the Central American governments once or twice, to interest Mexico, when Mexico had a responsible government and was very near at hand, but President Diaz was loath to take any part with the United States in such an arrangement, and we found that whatever had to be done had to be done largely on the responsibility of the United States.

If action in respect of any republic of South America were necessary under the Monroe Doctrine, the joining of the A B C powers with the United States might involve suspicion and jealousy on the part of other South American republics not quite so prosperous or so stable as the A B C powers. Thus, instead of helping the situation, the participation of part of the South American governments might only complicate it. I know something about the character of those countries myself, not from personal observation but from a study of the character of Spanish-descended civilizations and societies, and I venture to say that, sensitive as they all may be in respect to suspected encroachments of the United States, they are even more sensitive as between themselves and their respective ambitions. During my administration Mr. Knox, the secretary of state, tendered the good offices of the United

States as between South American governments who were bitter against each other over boundaries and other disputes, and successfully brought them to a peaceful solution; but in those controversies it was quite apparent that whatever might be the general feeling against the United States, their suspicions of each other, when their interests were at variance, were quite as intense. Indeed, it is not too much to say that the fear in the hearts of the less powerful peoples of South America of a South American hegemony is more real than any genuine fear they may have of the actual suzerainty of our government. My belief, therefore, is that unless we could organize a union of all the countries of two continents, which would be so clumsy as to be entirely impracticable, the influence of the United States can probably be exerted in support of the Monroe Doctrine more effectively and much less invidiously alone

than by an attempt to unite certain of the South American powers in an effort to preserve its successful maintenance. I hope my fear in this respect will prove to be unfounded and that the plan suggested may be successful.

I have read with a great deal of interest the account given by Professor Bingham of South American public opinion toward the United States in his most interesting book, which he calls "The Monroe Doctrine, an Obsolete Shibboleth." His views were based on an extended and very valuable opportunity for observation in nearly all the South American countries. He pictures with great force the feeling that is cultivated by the press of those countries against the United States, the deep suspicion that the people of South America have toward her professions of disinterestedness in South American and Central American politics, and their resentment at what

they regard as an assumption of guardianship and of suzerainty over them, and a patronizing attitude which they believe to be involved in the maintenance of the Monroe Doctrine. He sets out the construction put by them on the various acts of the United States, and the mean and selfish and greedy motives they attribute to her, judging from speeches by their statesmen and politicians and from editorials of their newspapers. I know something of the opportunity the Spanish language affords to convey, with the most studied and graceful periods and with an assumption of courteous and impartial treatment, insinuations and suspicions of the sincerity of a person or a government against whom the writer desires to awaken the hostility of his readers. Professor Bingham, without discussing the merits of the acts of authorities of the United States, to which he invites attention, merely gives the view

that the South American press of different countries took of those acts. No one can read the book and not see how unjust is much of the criticism of the United States. Nevertheless, I quite agree that it is the bounden duty of this government and her people to avoid as much as possible those acts which can give rise to a misconstruction of her motives, and to take a course which shall deprive them of any appearance of a desire to use her power in this hemisphere or to enforce and extend the Monroe Doctrine with a view to her selfish aggrandizement. I know the attractiveness of the Spanish-American; I know his high-born courtesy; I know his love of art, his poetic nature, his response to generous treatment; and I know how easily he misunderstands the thoughtless bluntness of an Anglo-Saxon diplomacy and the too frequent lack of regard for the feelings of others that we have inherited.

I sympathize deeply with every effort to remove every obstacle to good feeling between us and a great and growing people, if only we are not called upon in doing so to give up something valuable to us and to the world.

The injustice of the attitude which Professor Bingham and others who take his views describe as that of the South American press may be seen by one or two references. Our Cuban war was begun with the most unselfish motives on our part and with a self-denying declaration; but it has been flaunted in South America as a war for aggrandizement and the exploitation of new territory, because the people of Porto Rico desired to come under our government and we accepted them, and because we found the Philippines in such a condition of anarchy that we had to take them over. We have not exploited either Porto Rico or the Philippines. We have only

given them a better government and more prosperity and individual liberty than they ever had. We have promised the Filipinos that when their people acquire sufficient education and knowledge to make their government stable we will turn over the government to them. Twice Cuba has been under our control, and twice we have turned the island back to the people to whom we promised to do so when we entered upon the war. It has cost us hundreds of millions of money and many valuable lives to give her her independence. Nevertheless, our conduct, as unselfish and self-sacrificing as history shows, is treated among the South American people as an indication of our desire to enlarge our territorial control. Had we desired to extend our territory, how easily we could have done it? How many opportunities have been presented to us that we have rejected? Now, is it a reason for us to give up a

doctrine that has for near a century helped along the cause of peace that our motives in maintaining it have been misconstrued by the peoples who have so much profited by our enforcing it? If we had entered upon the policy merely because those peoples asked us to assert it, and for no other reason, then their wish to end it might properly be given great weight, but the doctrine was originally declared to be one in our own interest and for our own safety. True, it has greatly strengthened our insistence upon the doctrine that it helped these peoples to maintain their governmental integrity and independence. Nevertheless, the question whether we shall continue it ought not to be controlled by their unjust feeling that our continued maintenance of the doctrine, with its proper limitations, in our own interest is in some way or other a reflection upon their national prestige and international

standing. It has made for peace in ninety years. Why will it not make for peace the next one hundred years?

But it is said that the doctrine has been greatly extended and that it has led to intermeddling by our government in the politics of the smaller countries like Santo Domingo and the Central American republics, and that we are exercising a protectorate of a direct character over some of them. What we are doing with respect to them is in the interest of civilization, and we ought to do it to aid our neighboring governments whether the Monroe Doctrine prevails or not. My hope, as an earnest advocate of world peace, is that ultimately by international agreement we shall establish a court, like that of The Hague, into which any government aggrieved by any other government may bring the offending government before an impartial tribunal to answer for its fault and to abide the judg-

ment of the court. Now, it is utterly impossible that the peace of the world may be brought about under such an arrangement as long as there are governments that cannot maintain peace within their own borders and whose instability is such that war is rather the normal than the exceptional status within their territory. One of the most crying needs in the cause of general peace is the promotion of stability in government in badly governed territory. This has been the case with Santo Domingo and Haiti. It has been true in a majority of the republics of Central America and until recently was true in the northern part of South America. Revolutions in those countries have been constant, peace has been the exception, and prosperity, health, happiness, law and order have all been impossible under such conditions and in such governments. The nearer they are to our borders the more of a nuisance they have become to

us and the more injurious they are to our national interests. It was the neighborhood nuisance that led to the Cuban war and justified it. Now, when we properly may, with the consent of those in authority in such governments and without too much sacrifice on our part, aid those governments in bringing about stability and law and order, without involving ourselves in their civil wars, it is proper national policy for us to do so. It is not only proper national policy but it is international philanthropy. We owe it as much as the fortunate man owes aid to the unfortunate in the same neighborhood and in the same community. We are international trustees of the prosperity we have and the power we enjoy, and we are in duty bound to use them when it is both convenient and proper to help our neighbors. When this help prevents the happening of events that may prove to be an acute violation of the Monroe

Doctrine by European governments, our duty in this regard is only increased and amplified. Therefore it was that Mr. Roosevelt mediated between Venezuela and the governments of England, Germany, and Italy, as I have already explained. So it was in the case of Santo Domingo, where a similar situation was foreshadowed, and in which, in order to relieve that situation, we assumed the burden of appointing tax-collectors and custom-house officials who were under our protection and who were saved from revolutionary attacks. We thus took away any motive for revolution, because it could not be successful without the funds which the seizure of custom-houses and the instrumentalities for the collection of taxes would furnish. This arrangement has been most profitable to the people of Santo Domingo and has relieved them from a succession of revolutions that had been their fate before it was adopted.

The policy does not involve and ought not to involve a protectorate or any greater intervention in their internal affairs or a control of them than this power to protect custom-houses may involve. This is ample to secure pacification.

We cannot be too careful to avoid forcing our own ideas of government on peoples who, though favoring popular government, have such different ideas as to what constitutes it, and whose needs in respect to the forms of government that promote prosperity and happiness for them are widely variant from our own requirements.

Arrangements similar to that made with Santo Domingo were sought from the United States by the governments of Honduras and Nicaragua, and treaties were made, but they were defeated by the Senate of the United States without good ground, as it seems to me. I am

glad to note that the present administration is looking with more favor upon treaties of this kind than its present supporters in the Senate were willing to give them when they were tendered to them for ratification by a Republican administration.

When we come to Mexico, where anarchy seems now to reign, the question is a most delicate one. Intervention by force means the expenditure of enormous treasure on our part, the loss of most valuable lives, and the dragging out of a tedious war against guerillas, in a trackless country, which will arouse no high patriotic spirit and which, after we have finished it and completed the work of tranquillity, will leave us still a problem full of difficulty and danger. All that those of us who are not in the government can do is to support the hands of the President and the secretary of state, and to present to the European powers

and the world a solid front, with the prayer that the policy which is being pursued, whatever it may be, will be a successful one and relieve us from the awful burden of such a war as that I have described. In spite of the discouraging conditions in Mexico, however, the present situation illustrates the influence of the Monroe Doctrine on the attitude of the European powers, which, in spite of the injury to the property and persons of their nationals, look to the United States as the guide whom they are willing to follow in working out a solution. The condition of Mexico is bad enough, to be sure, but if it had involved us in European complications, such as would have been likely to arise had there been European intervention, its consequences might have been a great deal worse.

Exception is taken to the resolution which the Senate adopted in August, 1912, in which it was declared:

That when any harbor or other place on the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another government, not American, as to give that government practical power of control for national purposes.

It suffices to say that this is not an enlargement of the Monroe Doctrine. It only calls special attention to a way of indirection by which it can be violated. The policy of making this announcement at the time may perhaps be questioned, but that such an indirect method of securing a military outpost threatening to the safety of the United States would be injurious to her interests does not admit of doubt.

I do not intend here to go into the question of the merits of the controversy

over the justice of our acquisition of the Canal Zone, enabling us to construct the Panama Canal. It would involve too long a discussion and is not relevant to the subject-matter of this chapter, because what was done in that case by our government was not any assertion of the Monroe Doctrine, was not justified on the ground of the Monroe Doctrine, and our right to do what we did was based on very different principles. Earnest and sincere efforts were made in my administration to satisfy the United States of Colombia. A treaty was made with her representative, in Mr. Roosevelt's administration, which seemed fair, but it was immediately rejected. All efforts to secure an adjustment of her grievances have failed, and recently negotiations were postponed by her, with the belief that the incoming administration, of different political complexion, would be more willing than mine to do what she regards as

exact justice to her. We should, therefore, await with hope that the present administration may solve what for us was an insoluble difficulty.

Mr. Root, whose great constructive labors in the cause of world peace have just received most just recognition in the Nobel Prize, in his visit to South America attempted to convince the people of those republics that we wish no more territory and that we wish only the prosperity of all our neighbors. And Mr. Knox, in his visit to Venezuela and to all the republics of the West Indies and Central America, made the same effort. I hope that Mr. Roosevelt may carry the same message to South America. Doubtless, he is doing so.

After some years I hope that a consistent course on our part may effect an abatement of the present feeling described by Professor Bingham and others. But, however that may be, and whatever in-

justice the South American peoples may do us in suspecting us of selfish plans against them and their territory, we ought not to allow the present expressed hostility to the Monroe Doctrine, which really involves no assertion of suzerainty or sovereignty over them, to change our course. The doctrine is based on a wise policy in our own interest to exclude from this hemisphere the selfish political interference of European governments and their appropriation of territory, not for the purpose of increasing our power or territory, but for the purpose of promoting the prosperity, independence, and happiness of the peoples of these two continents and so of insuring our own peace and safety.

CHAPTER II

SHALL THE FEDERAL GOVERNMENT PROTECT ALIENS IN THEIR TREATY RIGHTS?

The spread of democracy throughout the world and the influence that each people has in determining the foreign policy of its government have necessarily affected the discussion of useful agencies for the avoidance of war. Before the nineteenth century, wars largely turned upon the interests of dynasties and the ambitions and hatreds of kings, but now wars between countries having stable governments are rarely begun without the wish of the majority of their respective peoples. Even a country like Russia, in the government of which the people are

not supposed to have a great voice, was obliged to make peace in the Japanese war largely because her people opposed its continuance. Therefore, it becomes important, in the maintenance of peace, that each stable government representing its people in its foreign relations, and being answerable for them to another people, should be able to perform its promises promptly, and should certainly not keep them only to the ear and break them to the hope. Nice distinctions based on precedents in international law have more weight with learned statesmen representing a dynasty than with an angered people. When they suffer injustice they look to the substance of the international contract for their protection, and if that is not performed, and the breach is an outrage upon their own race and their own kith and kin, their indignant feeling is dangerous to the peace between the two nations.

In one of my visits to Japan, as secretary of war, I had the pleasure of meeting and talking with Count Hayashi, one of the great statesmen and diplomats of that wonderful empire, and recently deceased. We were discussing very freely the relations between Japan and the United States, and he said that he felt confident that I was right in saying that the United States had no desire for a war with Japan, but, on the contrary, wished to avoid it by every honorable means. He expressed the hope that I credited his statement that the empire of Japan and those responsible for its government were equally anxious to make the peace between the two countries permanent and abiding. "But," said he, "my people have grown much in national stature. They have won successes, civil and military. They have a deep love of their country and of their fellow countrymen, and perhaps they have what you will call 'patriotic self-

conceit.' However this may be, their sensitiveness as a nation has increased, and it makes them deeply resent an injustice or an invidious discrimination against them in a foreign country or by a foreign people. The only possible danger of a breach between our two nations that I can imagine would be one growing out of the mistreatment of our people, living under the promised protection of the United States, through the lawless violence of a mob directed against them as Japanese."

Now, what is true of the relation of these two countries is likely to be true of the relation between the United States and peoples of other countries. With almost every nation we have a treaty in which each contracting party agrees that the nationals of the other party may reside within its jurisdiction and, complying with the laws, may legally pursue their vocations or business and enjoy the

same protection to life, liberty, and property that the citizens of the contracting country enjoy. This is, perhaps, the most common clause in the many treaties of amity and commerce that now control the relations between the nations of the world.

Since 1811 there have been many cases of mob violence against aliens, in which they have been killed or grievously injured. And while in all these cases we denied any liability, Congress has generally made payments to those who were injured and to the families of those who were killed. In some cases the amount paid was recited in the act of appropriation to be a gratuity without admission of liability. In other cases the amount was paid without such reservation. In no case that I have been able to discover have the perpetrators of these outrages been punished. In all the cases the local authorities have evidently sym-

pathized with the mob spirit and purpose or have been so terrorized by it as to avoid making a judicial investigation of real thoroughness. The results have thus been: first, the mob; second, the felonious assault, or murder, and destruction of property; third, the farce of a State investigation; fourth, the indemnity to the injured and the family of the dead; and, fifth, the complete immunity of the guilty. Such a list of outrages, reaching clear from 1811 down to 1910, without punishment, is not a record in which we can take pride.

I propose to consider here whether anything can be done to change this state of affairs so long continued that recurring incidents of the same kind constitute it a custom. I feel confident that something effective can be done to this end through valid federal legislation conferring on the federal government and courts executive and judicial jurisdiction to pre-

vent and punish these crimes against aliens in violation of their treaty rights.

In some of such cases the feeling between the countries involved has run high, and with the increased popular control of foreign policies we may expect these incidents to become more dangerous to our peace. In letters of our secretaries of state, in answer to complaints of foreign governments in such cases, attention is called to the fact that our general government has no jurisdiction to direct the prosecution under federal law of the perpetrators of these outrages, and the secretaries have been content with the statement that the persons killed or injured have had the same protection that citizens of this country have had, which, I may add, in all the instances under examination, was no protection at all. The secretaries have pointed out that if protection was needed or punishment was to be inflicted, it was the duty of the

State authorities to give it, as would have been the case had the persons killed or feloniously assaulted been American citizens. We make a promise and then we let somebody else attempt to perform it, and when it is not performed and it never is, we say: "We are not responsible for this. It is somebody else's failure, and, besides, you are not suffering any worse than our own citizens in this matter, because they enjoy the same absence of protection extended to your people. However, say no more about it. We'll salve your feelings by a little money, the amount of which we'll fix." Now, we know the fact to be from this history that in such cases generally there is not the slightest hope through the State courts of having proper punishment inflicted, or even attempted. In such cases the juries are generally drawn from the immediate neighborhood of the county and town in which the outrage is com-

mitted, and the case ultimately reduces itself to the result that the grand jury, or, if an indictment is found, which is almost as rare as a conviction, the petit jury, will be composed of either the criminals themselves or of their relatives and neighbors and sympathizers, and the prosecution is a farce.

It does not soothe one's pride of country to note the number of lynchings of our own citizens that go unwhipped of justice and that are properly held up to us with scorn whenever we assume, as we too frequently do, a morality higher than, and a government better than, that of other peoples. Nor is our feeling in this regard rendered less acute by hearing from the governors of some of our States expressions brazenly defending and approving such lynchings. Still more embarrassing is our situation, when we are called upon to explain to a government with which we have made a solemn cove-

nant to protect its citizens or subjects in their right of peaceable residence here and in the enjoyment of business and happiness under the ægis of the United States, that, while we did make a covenant, it ought to have known that under our system we as a government had no means of performing that covenant or of punishing those who, as our citizens, had grossly violated it. For lynchings of our own citizens within the jurisdiction of the State we can say to ourselves, for we have no other plea, that under the form of our government such crimes are a State matter, and if the people of a State will not provide, for their own protection, a machinery in the administration of justice that will prevent such lawless violence, and a public opinion to make it effective, then it is for them to bear the ignominy of such a condition. But when, in the case of the lynchings of aliens, whom we have plighted our na-

tional faith to protect, the fact is that the Federal Government has the power to enact legislation to set its own administration of justice going by its own prosecuting officers and through its own courts, and has not done so, we may well hang our heads in the face of adverse criticism.

Such legislation need not find its only reason in our pride of country and our commendable desire to be considered in the first rank of civilized nations, observant of treaty obligations and earnest in the protection of the rights both of our own citizens and our foreign guests. A much stronger reason for such legislation is in the Federal Government's taking over the right to protect itself and all the people against the danger of war that may be thrust on us by the lawless, cruel, prejudiced action of the people of a town, a city, or a county in dealing with subjects or citizens of other countries. It might well be that the race prejudice of

such a community would carry us into war, and thus sacrifice thousands of valuable citizens drawn from the whole country, and consume hundreds of millions of treasure, to be met by taxation upon all the people of the United States. Ought not the government, therefore, to insist, should not all the people of the United States require, that their executive at Washington, with a full knowledge of our delicate relations to the foreign sovereign whose subjects have been murdered, should have power enough to set the whole prosecuting and detective machinery of the government at work to bring the ringleaders of such mobs to trial before juries summoned from a wider vicinage than that of the local community in which the outrage was committed, and free from the sympathy and terrorism there likely to exist?

But it is said that the dead are not protected or restored to life by punish-

ment of the malefactors, that those who are injured have no right to criminal prosecutions, which are matters of State concern only, and that, as the injury has been done, if pecuniary indemnity is granted by the general government, all that the victims can properly demand is given them. I am not discussing this from the standpoint of the victims at all. I am discussing it from the standpoint of our own governmental self-respect, safety, and freedom from international offence. It is true that the only punishment of perpetrators to such an outrage must come after the outrage; but if the ringleaders of one mob in a United States court were hanged for murder, the number of future lynchings of foreigners would be reduced in direct ratio to the certainty of a repetition of that kind of justice. I have had occasion to say before, and I say again, that the manner of trial in the Federal courts, in which the judge

has the same control of the trial that he has at common law, can assist the jury in its investigation of facts, and can take charge of the trial out of the hands of the counsel for the defence, is a terror to evil-doers. While in the Eastern State courts, justice in crimes of violence is generally meted out with even hand, in the Western and Southern State courts this is not true, and the difference between the administration in the Federal courts and in the State courts in such States is well known to those who are likely to become criminals. The certainty with which mail robbers have been brought to justice makes every man who thinks of robbing the mail consider the chances of escape from Uncle Sam. Indeed, cases have occurred in which train robbers have religiously refrained from sacking the mail-car in order to avoid the federal jurisdiction. Moreover, in cases of mob violence against aliens, the

direct energetic action of the National Government under the eye of the complaining foreign ambassador at Washington would itself take the sting out of the incident, and minimize its danger as a cause for bad feeling between the two countries.

Of course, every one recognizes that the government of the United States cannot guarantee the detection and arrest of the criminals in such cases, or contract that when they are caught and tried, conviction will necessarily follow. In no civilized country can this be assured, and this circumstance is an implied term of every treaty promise of this sort. But that uncertainty does not prevent courage, promptness, and energy on the part of the marshals and detective agents of the government in efforts to identify and arrest the offenders and to find the evidence against them, or efficiency on the part of the prosecuting officers in properly preparing

the case for the grand and petit juries. It is the utter absence of any sincere effort of the local authorities in such cases to bring the criminals to justice that naturally angers foreign peoples when they are asking reparation for the awful results of mob violence. It is our actual helplessness, and our hopelessness of any remedial measures to prevent a recurrence of such outrages, that give the futile negotiation such a deplorable color in the eyes of the injured nation.

We can all remember the deep feeling aroused in our whole people over the massacre of the Jews in parts of Russia and the intense indignation that manifested itself among their coreligionists in this country, and how sceptical all our people were concerning official denials of governmental responsibility for such outrages. Let us try to look at lynchings of aliens in this country from the standpoint of their fellow countrymen at

home. In the utter absence of protection or attempted punishment of the murderers, can we wonder that there should be a deep-seated suspicion on their part that the bloody riots have been with either the connivance or acquiescence of our authorities?

Federal legislation which would remedy the present great defect in the powers of the National Government to protect aliens in their treaty rights has been proposed to Congress a number of times and has encountered serious opposition. The question was submitted to a committee of the American Bar Association that made a report in 1892, in which the constitutionality of such legislation was doubted and its wisdom was vigorously denied. We must assume that the reasons stated by the committee in that report are those which have moved Congress to withhold the action for which, in my judgment, there is a crying need. It is greater now than ever it was. It cannot be said that

respect for the law or constituted authority has increased in this country. Especially has it been weakened in those communities where class or race feeling seeks expression. Nor is the administration of criminal justice in the States in such cases likely to be more prompt or certain in the future than in the past. It is in such jurisdictions that the innovation of recall of executive officers is in vogue—a device which is not calculated to make governors or sheriffs or prosecuting attorneys more active in their arrest and prosecution of mob leaders, who are too often only exponents of local feeling and have the sympathy of the vicinage. When we add, as we may, that in many such States the recall of judges also has just come into use, we can understand how utterly futile it is to expect that there will be any improvement in making good the government's promise to aliens through such official agencies.

In order to meet the arguments of those

who oppose this legislation, I shall run over the objections that were presented by the committee of the American Bar Association to whose report I have referred. I ought to say in advance, with respect to the committee, that it was evidently composed of strict constructionists of the Constitution, that their report was not adopted by the American Bar Association, but that instead they were discharged from the consideration of the subject, and, because of divided views in the association, a resolution was adopted declaring it inexpedient for the association to make any recommendation to Congress on the subject. The reference of the subject to the committee was prompted by the then recent lynching of nine Italians confined in a New Orleans jail. A bill had been introduced into Congress to confer on Federal courts jurisdiction to try and punish perpetrators of such outrages.

The first reason given as against such legislation was that outrages equally shocking as that at New Orleans had occurred in the past without suggesting any necessity for interfering with the powers of the States to punish crime. It might have been added that no one had ever been brought to justice for the commission of any of the outrages of a similar character that had been committed since 1811. Just because a glaring defect has been allowed to exist for a century, is that any reason why we should not now take steps to remedy it?

The second objection was that in more than a century only seven cases have occurred to which by any possibility this legislation could apply.

In answer to this, I can only set out an official list of the outrages committed in recent years.

At Rock Springs, Wyoming, on November 30, 1885, there was an armed at-

tack by one hundred men on a Chinese settlement in a mining town, in which all the houses were burnt, and in which twenty-eight Chinamen lost their lives, sixteen were wounded, and all their property was destroyed.

In a similar attack in Squak Valley, Washington, three Chinamen were killed and four wounded.

At Orofino, in Idaho, five Chinese were killed.

At Anaconda, in Montana, four Chinamen were killed.

At Snake River, Oregon, ten Chinamen were killed.

In Juneau, Alaska, one hundred Chinese were expelled by lawless violence from their homes and the territory.

In an official note of February 15, 1886, riots were reported at Bloomfield, Redding, Boulder Creek, Eureka, and other towns in California, involving murder, arson, and robbery, and it was added that

thousands of Chinese had been driven from their homes.

Nine Italians were lynched in New Orleans in 1891.

In August, 1895, one Mexican was lynched in California.

In October, 1895, one Mexican was lynched in Texas.

In 1895 three Italians were lynched at Walsenberg, Colorado.

In 1896 three Italians were lynched at Hahnville, Louisiana.

In 1899 three Italians were lynched at Tallulah, Louisiana.

In 1901 three Italians were lynched at Erin, Mississippi.

In 1910 one Italian was lynched in Florida.

This list, it seems to me, is a sufficient answer to the suggestion made by the committee that such events do not occur with sufficient frequency to require reform, especially when we consider in con-

nection with these cases the recent very acute feeling over the treatment of Japanese subjects in California.

The third objection by the committee to Federal control of such prosecutions was that two of the outrages against aliens were in territories in control of the Federal Government, and no better enforcement of the law was shown there than in State jurisdiction. They were in territories under the control of territorial governments, with the same weaknesses that a State government has, with prosecutions in a county, with the jury drawn from the immediate vicinage and under the terrorism of a small locality, which is a very different thing from prosecutions in the regular Federal courts.

The committee's fourth objection was that the suggestion of this legislation has not come in any case from a foreign power with whom we are in treaty relations, and that the demands pressed upon the United

States Government have been almost uniformly not so much for punishment of the assailants as for pecuniary indemnity, which the injured parties had already the right to seek in the United States courts.

This statement is inaccurate. In many of the instances in which extended correspondence was had with our State department by the diplomatic representative of the foreign governments whose subjects had been killed or injured there were demands for punishment, and there were suggestions that the promise of protection was made by the United States in the treaty and that the foreign countries looked to the United States and not to the subordinate States for compliance with treaty obligations.

The fifth objection was that our secretaries of state, in their correspondence with complaining foreign representatives, have uniformly insisted upon the com-

mon-law principle that the punishment of crime must be left to the ordinary and orderly administration of justice by the State courts in like manner as in similar cases affecting our own citizens.

Of course our government has taken that position. The secretaries of state found themselves in such a position that they had to. It is not to be expected that they would have made prominent our failure to legislate when we might have legislated to give us the proper means of discharging our obligations.

In his annual message of December 5, 1899, President McKinley used these words:

> For the fourth time in the present decade question has arisen with the Government of Italy in regard to the lynching of Italian subjects. The latest of these deplorable events occurred at Tallulah, Louisiana, whereby five unfortunates of Italian origin were taken from jail and hanged. . . . The recurrence of these distressing manifestations

of blind mob fury directed at dependents or natives of a foreign country suggests that the contingency has arisen for action by Congress in the direction of conferring upon the federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved.

And he refers to a recommendation of President Harrison made in this matter in 1891, just after the Mafia case, in which President Harrison said:

It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers.

President McKinley then said:

I earnestly recommend that the subject be taken up anew and acted upon during the present session. The necessity for some such provision abundantly appears.

In his message of 1900 the same President made another urgent recommendation of the same kind.

President Roosevelt, in his annual message of December, 1906, in dealing with our relations with Japan, which were then of much public concern, said:

> One of the great embarrassments attending the performance of our international obligations is the fact that the statutes of the United States are entirely inadequate. They fail to give to the national government sufficiently ample power, through United States courts and by the use of the army and navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land. I, therefore, earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the President, acting for the United States Government, which is responsible in our international relations, to enforce the rights of aliens under treaties. There should be no particle of doubt as to the power of the national government completely to perform and enforce its own obligations to other nations. The mob of a single

city may at any time perform acts of lawless violence against some class of foreigners which would plunge us into war. That city by itself would be powerless to make defense against the foreign power thus assaulted, and if independent of this government it would never venture to perform or permit the performance of the acts complained of. The entire power and the whole duty to protect the offending city or the offending community lies in the hands of the United States Government. It is unthinkable that we should continue a policy under which a given locality may be allowed to commit a crime against a friendly nation, and the United States Government limited, not to preventing the commission of the crime, but, in the last resort, to defending the people who have committed it against the consequences of their own wrong-doing.

And in my Inaugural address, March 4, 1909, I brought the subject to the attention of Congress as strongly as I could, as follows:

By proper legislation we may, and ought to, place in the hands of the federal executive the means of enforcing the treaty rights

of such aliens in the courts of the Federal Government. It puts our government in a pusillanimous position to make definite engagements to protect aliens and then to excuse the failure to perform those engagements by an explanation that the duty to keep them is in States or cities, not within our control. If we would promise we must put ourselves in a position to perform our promise. We cannot permit the possible failure of justice, due to local prejudice in any State or municipal government, to expose us to the risk of a war which might be avoided if Federal jurisdiction was asserted by suitable legislation by Congress and carried out by proper proceedings instituted by the executive in the courts of the national government.

These citations would seem to refute any suggestion that those having official responsibility for our foreign relations have not realized the crying need for such legislation.

The committee's sixth objection was that upon this basis all complaints arising out of such cases have been settled through the ordinary diplomatic chan-

nels and without any loss of self-respect to our government

That is a matter of opinion. If one can judge from the communications from some of the secretaries of state to Congress and the messages of the Presidents just quoted, they feel very deeply the loss of self-respect that their enforced attitude and their inability to take action involves. Indeed, it is impossible to explain the payment by the Congress of the United States, on the recommendation by the executive, of an indemnity in every case of these international outrages, unless there has been a real feeling on the part of the authorities of this government that we are at fault and that we intend to do something to save, as much as possible, the blame that is properly chargeable to us and our government. The position of the government usually is that we do not owe anything as a matter of right. If so, and

if it is sound doctrine that we must treat equally the citizens of our own country and citizens of a foreign country, why should we discriminate and pay an indemnity to the foreign citizens or subjects who were injured or killed and not pay a similar indemnity in cases of lynchings of our own citizens? Our position and our action are not consistent and the reason why they are not consistent is because we have made the promise and are not in a position to perform it, and therefore we do the next best thing and try to salve the wounds of our sister nations by money payments.

The committee's seventh objection was that the method of dealing with such cases in England, the other great common-law country, is precisely analogous to our own.

This is inaccurate because in England the initiation of the administration of justice, the detection of criminals, and

the control of their prosecution is with the law officers of the crown.

Then the learned committeemen went into a consideration of the possible anomalies that would arise were felonious assaults upon foreign subjects or citizens made a federal offence. It was said that it might involve double jeopardy. Well, there are a great many instances in which just such double jeopardy, if it can be called such, occurs in respect of acts that constitute an offence against both State and Federal sovereignties. In view of the fact that such offences are never brought to trial in a State, much less to conviction, the practical danger of double jeopardy, if it be such, is most remote.

Then it is said that it will produce great confusion because there are so many aliens in this country that the assaults upon whom would crowd the Federal courts and introduce a deplorable delay.

Even if there were some delay in fi-

nally disposing of such cases, their energetic initiation is much to be preferred to that kind of despatch of the business in State courts which results in a report of the coroner and grand jury that the perpetrators are unknown. Nor is it true that such cases would clog the Federal courts. Those courts can take care of many more criminal cases to-day than in 1891, and the discretion of the attorney-general or the prosecuting officer of the Federal Government can well be trusted to leave to the jurisdiction of the State courts those crimes of violence against aliens that are in ordinary course and do not really involve race or national feeling or international complications. There are many classes of offences cognizable in both Federal and State jurisdictions in which such comity of arrangement exists and is satisfactory in its operation.

But it is suggested that in some way or other we are putting the foreigners

into a privileged class by providing for their protection by the United States courts and United States officers. Don't we do so by paying indemnities? But, more than this, the suggestion is beside the mark. Criminals have no vested rights to trial in a jurisdiction where conviction is impossible, or to object to a jurisdiction which is likely to convict them when they assault those whom the plighted hospitality of the nation ought to protect. We are not putting the victims in a privileged class solely or chiefly for the purpose of giving them any benefit, but rather for the purpose of protecting the Federal Government from just complaint by a sister nation and from being possibly involved in war by the lawlessness and selfishness of local communities.

The reasons of legislative policy advanced by the committee against the bill were thus, in the highest degree, techni-

cal and entirely without weight, and the lamentable occurrences since their report emphasize their error.

Finally, the committee intimated that such legislation as proposed would be in violation of the Constitution. They do not argue this out. They only suggest that it would be an invasion of the police power of the States, and they assume a construction of the Constitution that would have done in the days of Chief Justice Taney and the strict construction period of the Supreme Court before the war. They ignore a specific declaration by the Supreme Court that such legislation would be valid and a long series of cases by that tribunal which by analogy leave not the slightest doubt of the power of the government not only to assume such judicial jurisdiction after the offence, but also to take preventive executive measures before the offence to stop such outrages.

The bill proposed to give jurisdiction of such cases to the federal courts is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that any act committed in any state or territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, which act constitutes a crime under the laws of such state or territory, shall constitute a like crime against the peace and dignity of the United States, punishable in like manner as in the courts of said state or territory, and within the period limited by the laws of such state or territory, and may be prosecuted in the courts of the United States, and, upon conviction, the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.

The question of the validity of this proposed legislation under the Constitution involves a consideration of the treaty-making power of the Federal

Government and the powers necessarily resultant from that and incident to it.

The treaty-making power of the United States is the widest power that it has. The executive power in our domestic field of government is divided between the general government and the State governments, between the President and other executive officers of the United States, on the one hand, and State governors and other executive officers of the States on the other. The legislative power is divided between Congress and the legislatures of the States. The judicial power is divided between the Federal courts that exercise the jurisdiction extended to them by the Federal Constitution and laws and the courts of the States. But all governmental power exercised by the country in dealing with foreign governments is exercised by the Federal Government alone, and the only limitation upon that power is that in treaty making

the President and the Senate shall not violate any prohibition of the Constitution and shall exercise that power within the limits which international practice normally imposes as to the subjects to be included in a treaty. This wide and exclusive power of the central government in treaty making is easily to be inferred from the fact that by the Constitution the States are expressly forbidden to enter into any treaty, alliance, or confederation, to grant letters of marque and reprisal, unless Congress consents, to lay any duty of tonnage, to keep troops or ships of war, in time of peace, to enter into any agreement or compact with another State or with a foreign power, or to engage in war unless invaded; while the general government is expressly empowered to make treaties, to regulate commerce with foreign nations, to establish a uniform rule of naturalization, to define and punish pira-

cies and felonies committed on the high seas, and offences against the law of nations, to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for the calling forth the militia to repel invasions, to appoint ambassadors and other public ministers and consuls, and to adjudicate causes arising under treaties and all cases affecting ambassadors, other public ministers, and consuls, causes of admiralty and maritime jurisdiction, and cases between a State or the citizens thereof, and foreign states, citizens, and subjects. And, further than this, the treaties made by the authority of the United States are expressly declared to be the supreme law of the land and the judges in every State are to be bound thereby, anything in the

Constitution or the laws of any State to the contrary notwithstanding.

It would be difficult to make clearer the intention of the framers of the Constitution and the people who ratified it to give over to the general government the executive power to control foreign affairs and to give to the treaty-making power as wide a scope as treaties between independent governments are wont to have. As already said, one of the most common provisions in treaties between civilized countries is that which reciprocally binds each of the parties to give an opportunity for peaceful residence and pursuit of business in its territory to the citizens or subjects of the other.

Unlike treaties in most countries, a treaty made by the United States has a double aspect. It is not only a contract between the two countries, as it is in England and in other jurisdictions. It is that and more, because in so far as its

provisions in their nature can have operation in the United States as municipal law, they are statutes. They are equivalent to a law passed by Congress, and as such they repeal a previous inconsistent law of Congress, on the one hand, and can be repealed by a subsequent inconsistent law of Congress on the other. It follows, therefore, that aliens living in this country, whose sovereign has made a treaty with the United States in which the United States guarantees protection to life and property to such aliens during their residence within the jurisdiction of the United States, have a right under the federal Constitution and law to be secure against any invasion of their peaceable residence and the holding of property. Under the eighteenth clause of Section VIII of Article I of the Constitution, Congress has power to make all laws which shall be necessary and proper for carrying into execution all powers vested

by this Constitution in the government of the United States. It needs no straining of logic, but only the use of the reasoning pursued by the Supreme Court in hundreds of similar cases, to deduce the power of Congress under that clause to enact legislation to carry out and execute such an agreement by the United States to protect aliens from lawless violence. Therefore, it would be entirely competent for Congress to pass the bill I have quoted above.

Now, if the committee of the Bar Association, to which I have referred, had not expressed some doubts as to the power of Congress to pass such a law, I would not have thought it necessary to argue it. The power has been expressly affirmed by the Supreme Court. The case of Baldwin vs. Franks, 120 U. S. 678, involved the punishment of a man for using lawless violence against Chinese aliens resident in California, driving them

from their residence and depriving them of their legitimate business, contrary to a treaty made between the United States and China in 1881.

The Supreme Court said:

That the treaty-making power has been surrendered by the States and given to the United States is unquestionable. It is true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.

The court then recites the clause of the treaty and continues:

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt. What we have to decide, under the questions certified here from the court below, is whether this has been done by the sections of the revised statutes specially referred to.

But they found no law on the statute book with language which embraced such offences.

This decision was rendered in 1887 and the report of the Bar Association committee was in 1891, and the report, so far as I can find, does not mention the decision of the court in Baldwin vs. Franks. As the committee of the Bar Association had no jurisdiction to reverse the views of the Supreme Court, I assume that we can treat the constitutional construction declared by the Supreme Court as still in force.

But such punishment of crime in the federal courts and by the authority of the United States against those who violate the treaty rights of aliens is not the only thing that can be done. One of the ideas that it took a long time to get into the heads of strict constructionists of the Constitution was that there is not only the peace of a State, but there is

also, on the same soil, the peace of the United States; that while the breach of State law by violence is a breach of the peace of the State, breach of Federal law by violence is a breach of the peace of the United States.

In the case of Ex Parte Siebold, 100 U. S. 371–394, the court was considering an objection, very similar to the one made here, against a law providing for the protection of a citizen of a State in his rights under the Federal Constitution against assault. They said:

It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exer-

cised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its law, and hence the power to keep the peace to that extent.

In the Debs case, reported in 158 U. S. 564, Mr. Justice Brewer said:

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

This language has exact application to the protection of the treaty rights of aliens. Therefore, not only ought the bill to be passed which I have read above, providing for a punishment of lawless violence directed against the rights and welfare of aliens guaranteed in a treaty of the United States, but express statutory provision ought also to be made en-

abling the President, in his discretion, to act directly, and without reference to State action, in protection of such aliens when their safety and peaceable residence are threatened. Such executive power would doubtless be implied if Federal court jurisdiction were given, but it would be greatly better to make it express. Then the President could move at once to the protection of aliens living in settlements where mobs threaten attack, and practical results might be expected, making the protection of the United States a real thing. Then the secretary of state could look in the face the ambassador of the country whose subjects or citizens are threatened with a gross violation of their treaty rights, and point to the effective measures of protection taken to vindicate the honor and the plighted faith of the United States.

Now, if such legislation is so plainly needed, why has it not been enacted?

This is a hard question for me to answer except by suggesting that aliens are not voters and their rights are not a political issue. Both parties are at fault in this matter. When I was President, as quoted above, I urged the adoption of such legislation, and then took such steps as I could in other ways to secure its enactment. At my suggestion, Mr. Swagar Sherley, a leading Democratic member of the House, from Louisville, Kentucky, attempted to introduce such legislation into the revision of the judicial code, but objection was made on the ground that it would introduce new legislation into a code that should be only a revision of existing legislation. The separate bill for the purpose which was introduced, I could not, in the pressure of other legislation, induce either House to take up. There seemed to be the strong opposition not only of Democrats from the South but of Republicans from the far

West, and this prevented its consideration.

May we, therefore, not ask from this administration, in the course of which there has been exhibited, under the admirable leadership of the President, such wonderful party discipline in the passage of legislation, that action be taken on this important matter? The negotiations with Japan would, I am sure, be greatly assisted by giving such an earnest of the sincerity of our government in protecting her people in the rights we assure them. If it be said that the party in power is traditionally opposed to giving the Federal Government more functions and to concentration of power in Washington, we may well urge that when the party in power has swallowed camels in the passage of a law giving the largest government control of banking and currency known in our history, and in projecting a law vesting the widest Federal

power in respect to corporations doing interstate business, and another looking to Federal regulation of presidential primaries, the party leaders should not strain at the gnat of Federal performance of Federal promises, even if it may involve the transfer to the jurisdiction of Federal courts of a comparatively few cases which are now in theory triable in State courts but in fact are never tried there.

CHAPTER III

ARBITRATION TREATIES THAT MEAN SOMETHING

The war between Italy and Tripoli, the war in China, the war between the Balkan States and Turkey and then the subsequent war between the Balkan States themselves, the war in Haiti, and finally the war in Mexico, all are contemporary and convincing evidence that the dawn of universal peace is not immediately at hand. It is true that these are nearly all of them civil wars or revolutions, and that the restoration of peace in most of them requires only the establishment of stable governments. It is very certain that in such cases, treaties of arbitration, whatever their terms and

however solemnly entered into, are not a practical means of settlement. Many countries in the last century suffered from the disease of revolution. Looking back over half a century, we can properly say that in the countries subject to such outbreaks there has been great improvement; and, while Mexico shows retrogression in this regard, most of the South American countries have grown stronger in the maintenance of law and order and the preservation of constituted authority.

I think it is our duty, as a great, strong, powerful nation, when we can easily do so without involving ourselves in costly or dangerous war, to promote the cause of peace and order in any of our less stable neighbors through treaty arrangements with them, and this wholly without regard to the Monroe Doctrine. We have had such an opportunity with Nicaragua, with Honduras, with Santo Domingo, and we may possibly have the

same kind of an opportunity with other states similarly conditioned. They all owe what to them is a large amount of money to European creditors. Their creditors are willing to scale down the debts, which in justice ought to be substantially scaled, if they can be given greater security. The governments of these countries, confident that we are disinterested in the matter, have manifested a desire to have American bankers finance the readjustment of their obligations if our government will only consent to a treaty in which there is reserved to us the right to nominate collectors of their customs revenues and to protect such collectors against lawless violence.

The amount of force necessary to extend this protection is almost negligible. Indeed, it is not more than the show of force that we usually make to protect American interests in the breaking out of a revolution in these countries. I never

have been able to understand the argument against such treaties. They do not involve the Monroe Doctrine at all. They merely involve the obligation of a strong and powerful neighbor to help a weak one. They are in the interest of peace and good order and make for the just settlement of debts. In some way or other, such treaties are supposed to be a recognition of the right of European governments to collect the debts of their nationals by force; but I am unable to see why. They constitute merely a friendly act, and furnish a means to these governments of settling their past obligations and obtaining a much-needed sum of money to be expended in helping their people in education and in the development of their rich natural resources.

In Central America the difficulty has been that a dictator in one republic has intrigued against his neighbors. He became a disturbing factor for all the rest.

The treaties with Honduras and Nicaragua would give the United States an opportunity to exert a direct influence to prevent the consummation of such intrigues and to maintain a peace in that region of North America essential to the happiness of its people. Their trade is naturally of great value to us, and would be of much greater value if the arts of peace were pursued.

But the subject of this chapter is not that of specific treaties. It is the question of the relation of the Senate to general arbitration treaties. I understand a general arbitration treaty to mean a treaty by which the nations who are parties to it agree that they will in the future submit to arbitration all future differences which come within a class of issues defined in the treaty. What I propose to discuss here is whether the President and the Senate have the power to make such treaties in a form that will

really bind them and the government to anything substantial.

In Mr. Roosevelt's term there were a number of arbitration treaties negotiated and signed by Mr. Hay and submitted to the Senate, in which it was agreed between the United States and the other treaty-making party that all questions of a legal nature, not including those of national honor or vital interest, would be submitted to The Hague tribunal, and that when any difference arose a specific agreement of submission of the issue would be entered into. The Senate insisted that for the words "specific agreement," "treaty" should be substituted, in order that no specific agreement could be submitted under the treaty except with the advice and consent of the Senate. Mr. Roosevelt declined to ratify treaties with this limitation, on the ground that the treaty thus limited did not bring the country any nearer to arbitration

than if no treaty was made. On the other hand, the Senate insisted that it had no power to ratify such a treaty because it would be an unlawful delegation to the President alone of the treaty-making power.

The treaties thus drawn either attempted to describe a class of questions which the government bound itself to arbitrate or they did not. If not, then they were not treaties at all, and there was no occasion to discuss what the Constitution required with reference to treaties. In that view they were a mere general declaratory expression of a hope that the parties might make a treaty in the future. If, however, the treaties did define a class of issues which the United States agreed to arbitrate, then whether an issue thereafter arising came within the class or not was a matter of construction of the treaty. The agreement would then be nothing more than the framing

of the specific issue which came within the general class as defined. It is a well-understood incident of the treaty-making power that in a treaty there may be reserved, without an unlawful delegation of power, to the President, or to some other agent, the power to execute its provisions. As the Supreme Court said in Tong Yue Ting vs. the United States, 149 U. S. 698 and 714:

> It is no new thing for the law-making power, acting either through treaties made by the President and the Senate, or by the more common methods of the acts of Congress, to submit the decision of questions not necessarily of judicial cognizance either to the final determination of executive officers, or to the decisions of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize and permit.

It was, therefore, entirely within the authority of the treaty-making power, after having laid down a general rule of jurisdiction fixing a definite class of

questions which might be arbitrated before the stipulated court, to leave the formulation of the specific issue coming within that class for the executive.

The police power of Congress to regulate the rates on interstate commerce railroads is exercised by laying down some very general rules that rates shall be reasonable, and shall not be unduly discriminatory, and by then giving to the Interstate Commerce Commission the power under those general rules to decide what rates are unreasonable or discriminatory, and indeed to fix rates themselves.

In the argument by senators against the power of the Senate to agree that the President alone might formulate the specific agreement, much reliance was placed on the decision of the Supreme Court in Field against Clark, 145 U. S. In that case the Supreme Court merely laid down the general rule that Congress

could not delegate legislative power, and then held valid a provision in the McKinley tariff act which authorized the President to apply one or another set of duties to the imports from a foreign country as he decided whether the customs laws of that country were "reciprocally unreasonable" toward us. The case, instead of helping the contention of the Senate, made strongly for the view that giving the President the power to make the specific agreement was not an unlawful delegation.

The Hay treaties of general arbitration, as I have said, excepted from the issues of a legal nature to be arbitrated "questions of national honor and vital interest." Who could tell what were not questions within these exceptions? It left a discretion in each party to insist that any question concerned its honor or vital interest. Lord Russell, when first approached as to the possibility of arbi-

trating the issue growing out of the Alabama claims and the mulcting of Great Britain for her failure to perform her international duties, said that she could not admit that she had ever failed in that regard, and that it was a question of national honor which she would not submit to arbitration. And yet she did, and not only did she submit it to arbitration, but she paid the judgment of $15,500,000 rendered against her by an international tribunal.

The exceptions of the Hay treaties were so broad and general that the action of the Senate in declining to allow the President to make the specific agreement under them could be strongly defended on the ground that the treaties did not sufficiently define any class of questions and therefore that the specific agreement would be the only real treaty.

A treaty of arbitration is for the purpose not only of settling disputes, but

its main function is to prevent those disputes from resulting in war. A country is not likely to go to war except on an issue that involves its honor or its vital interest. Therefore, a treaty that excludes such questions from arbitration is not a treaty that covers the critical issues from which wars spring. I therefore determined, if I could, to negotiate a treaty that would leave out those exceptions and include all questions that could be arbitrated.

There are many questions between nations that concern the welfare of both, with respect to which, under any system of international justice, a nation must have absolute discretion and control of its own conduct. Take, for instance, the question whether England shall take part in our Panama Exposition. That may cause bad feeling in California or in this country generally, but no court of arbitration would make a ruling that En-

gland was obliged to take part in our exposition. That is not a justiciable question. If, however, England had agreed by treaty to take part in our exposition, then a right would be created by contract, and it would properly become the subject of arbitration and decision.

You cannot bring all subjects of difference between individuals into a municipal court. A man may be unneighborly; he may not call on his neighbor, he may notify his neighbor that he does not propose to have the latter's children come into his place; he may do a lot of unkind things that arouse the indignation of his neighbor and show he is a very mean man. But these do not give any cause for a suit. One cannot compel his neighbor to be generous and good and courteous by a lawsuit. In other words, there is a field into which courts of justice cannot enter, whether they be municipal courts in a State, or arbitral courts be-

tween nations, and that distinction must be just as clear in an international court as in one of our domestic tribunals.

In the formulation of our treaties it was necessary to hit upon some term which would define, as a class, those causes of difference between nations that would constitute, under the principles of international law, an infringement of the legal rights of another nation analogous to rights remediable in municipal courts of justice between individuals. The description must exclude those obligations of courtesy and good-will that are enforced only by the sanction of a national conscience or by the influence of international public opinion, or by what Lord Haldane has referred to as *Sittlichkeit*, or international "Good Form." The analogy between matters of domestic judicial cognizance and those proper to be considered in international law tribunals is quite close. Mr. Knox found a phrase

that seemed to me to be most happy in the description of the character of questions that should be arbitrated between the United States and other established governments if negotiation failed. He found it in an opinion of Chief Justice Fuller in a case in which the Supreme Court was acting as a quasi-international tribunal. One of the great examples of successful international arbitration is the arrangement for the jurisdiction of the Supreme Court under our Constitution in settling the controversies between sovereign States. It furnishes a model that in future generations will, I hope, prove to be useful in the formation of a general arbitral court for all the stable nations of the world. This case to which I refer was a controversy between Kansas and Colorado as to the water-rights of the two States and their respective residents and landowners in a stream which began in one State and

ran into the other. The Chief Justice, speaking of the effect of the Constitution, said:

> Undoubtedly, as remarked by Mr. Justice Bradley in Hans vs. Louisiana, 134 U. S. 1, 15, the Constitution made some things *justiciable*, "which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution." And as the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made *justiciable* by that instrument. 185 U. S. 125, 141.

Mr. Knox used in the treaties the word *justiciable* to describe the differences which the parties bound themselves to arbitrate. Those controversies only would come within the term which were just cause for reprisal by the complaining State according to international law. That law grants a reprisal only when

a positive wrong has been inflicted or rights *stricti juris* are withheld. The rule which controls foreign and independent states in their relations to each other is that the primary and absolute right of a state is self-preservation. The improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty. She has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary-line. Her moral obligation to observe the demands of comity, that is, of good neighborly feeling, cannot be made the subject of legal controversy. In the light of such limitations fully recognized in international law, the definition of those issues intended to be arbitrated is easily applied. The language of the treaties is:

> All differences . . . relating to international matters in which the high contracting parties are concerned by virtue of a claim of

right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity.

First, the differences must relate to international matters; second, they arise upon a claim of right, *i. e.*, a right under a treaty or under principles of international law of one against the other; third, they must be justiciable, *i. e.*, capable of judicial solution by application of the principles of law or equity. Those principles, of course, are principles of international law or equity. As this phrase is used not only in an English treaty but in a French treaty, the words are not to be confined to the technical meaning of law and equity as those words are understood in the jurisprudence of England and the United States. Still, the terms law and equity have a similar signification in many countries. Ancient systems of law grown rigid have been modi-

fied by applying more liberal principles in reaching justice. Equity has ameliorated and mitigated the severity of the law. The two words used together, therefore, were intended to comprehend all the rules of international law affecting the rights and duties of nations toward each other which are not mere rules of comity but are positive and may be properly enforced by judicial action.

The first clause of the Knox treaties provides that such questions shall be submitted to the Permanent Court of Arbitration established at The Hague, or to some other tribunal agreed to by the parties by special agreement, which shall be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate. The second clause provides for the appointment of a Joint High Commission of Inquiry to investigate any controversy between the two parties,

whether within or without Article I, which investigation may be postponed for a year by either party in order to give an opportunity for negotiation and settlement. The Joint High Commission is to be constituted by each party's designating three of its own nationals to sit therein, with authority to vary the character of its appointees. The action of the Joint High Commission is to be regarded merely as advisory except in one case. If either party contends that the difference is not arbitrable by the terms of the treaty, the Joint High Commission, by a vote of five to one, may decide that it is arbitrable within the treaty, and the decision is to bind the parties. Thereafter, the arbitration is to proceed before The Hague or other tribunal as provided in the treaty. Good faith under the treaty would require, in the event of such a decision, that the President and the Senate make the spe-

cific agreement required in the first section and proceed to carry out the arbitration. Of course it would be within the power of the Senate, as, indeed, it would be within the power of the President, to decline to make such a specific agreement and thus to break their obligation and that of their government.

I suggested to Mr. Knox a form of treaty under which either party might submit to the permanent court at The Hague its complaint against the other, and the court after objection and hearing should first decide whether the complaint constituted an arbitrable case within the first clause of the section, and if it so found, it should then proceed to hear and decide the issue made. But Mr. Knox felt that the time had not arrived when so radical a proposition as that would be approved by the Senate or possibly by the country, and therefore he suggested a preliminary decision as to jurisdiction

by this Joint High Commission to be composed of three Americans and three Englishmen, or three Americans and three Frenchmen, as the case might be. I regarded this as a very mild provision, because at least two Americans out of three must concur in holding that the difference in question was within the description of the general class of questions agreed to be arbitrated before the judgment could be binding on both parties. The suggestion of possible danger of injustice to the interests of the United States arising from the decision by a majority of five to one of a tribunal composed half of Americans and half of the nationals of the other treaty-making power is chimerical and imaginary.

Such objections grow out of the unwillingness of the men who suggest them to enter into any arbitration by contract or treaty in advance of the happening of the event which gives rise to the dif-

ference. Consciously or unconsciously, they are not sufficiently in favor of a judicial decision of questions between nations to be willing to lay down a general law for arbitration or to make a general classification of subjects for arbitration and abide by it. They insist on knowing all the circumstances with reference to a particular issue before they are willing to bind themselves to arbitrate it at all.

As in the consideration of the Hay treaties, so here it was argued that the President and the Senate would unlawfully delegate their treaty-making power if they agreed that a tribunal should finally adjudge that a specific difference, subsequently arising, was in the class of differences covered by the treaty. It is very difficult to argue this question because the answer to it is so plain and obvious. The question whether a specific case arising after the general treaty is

made comes within the language of the treaty is a question of the construction of the treaty and its application to events subsequently arising. Construction of a treaty is the issue more frequently arbitrated between nations than any other. It is true that the question here is one of jurisdiction rather than one upon the merits of the controversy, but both arise in the construction of a treaty and both, therefore, are the normal subjects of arbitration. To leave a question arising in our foreign relations to arbitration is, of course, not a delegation of power at all. Delegated power is conferred on an agent. The tribunal does not act as agent but as a court deriving its power not from either party but from the agreement of both. The view that makes a submission to a tribunal a delegation of power to an agent would prevent the President and Senate from agreeing to arbitrate anything at all. And yet we

have made arbitration treaties since the Constitution was adopted and before. The rightfulness of the power exercised under these Knox treaties to submit the question of jurisdiction to the arbitral tribunal is much clearer than was the power of the Senate to consent that the President might make the specific agreement in the Hay treaties; and this for two reasons; first, because in the Knox treaties the classification is one of clear definition as it was not in the Hay treaties; second, in the Hay treaties the President was an executive agent and the question of unlawful delegation to him alone of the treaty-making power fairly arose. But here the objection is a plain confusion of conferring power on an agent with submitting a judicial issue to a court. The only logical position that could defeat the right of the President and the Senate to agree to submit to a tribunal the question whether a

subsequent difference comes within the general but definite classification of arbitrable issues in a general arbitration treaty is the utterly untenable one that the President and the Senate have no right to submit to an international tribunal at all the decision of those international matters that the President and the Senate under the Constitution are given power to deal with in our international relations.

Nevertheless, the Senate struck out the provision for a decision by the Joint High Commission. I considered this proposition the most important feature of the treaty, and I did so because I felt that we had reached a time in the making of promissory treaties of arbitration when they should mean something. The Senate halted just at the point where a possible and real obligation might be created. I do not wish to minimize the importance of general expressions of good-will and

general declarations of willingness to settle everything without war, but the long list of treaties that mean but little can now hardly be made longer, for they include substantially all the countries of the world. The next step is to include something that really binds somebody in a treaty for future arbitration. The treaties of arbitration are not going to accomplish substantial progress unless we enter into them with a willingness and a consciousness that they may involve us in decisions to our detriment. We cannot win every case. Nations are like individuals; they are not always right, even though they think they are, and if arbitration is to accomplish anything, we must be willing to lose and abide by the loss. If we are to establish real arbitral courts which shall be useful as a permanent method of settling international disputes, we must agree in advance what the jurisdiction of those courts shall

be, and then abide by their holding as to that jurisdiction and perform the judgments that are made against us. But if we assume that it is dangerous for us to consent to go into any arbitration, lest the court make gross errors in international law and may decide contrary to the principles of the law as we entertain them, then let us take some other method of settling international disputes.

The Senate, in its conditional concurrence in the arbitration treaties prepared by Secretary Knox, made certain reservations. The first limitation was that they should not authorize the submission to arbitration of any question affecting the admission of aliens into the United States. If there are not treaties on the subject, the rule of international law is clear and specific that no aliens can be admitted into a country without the consent of its government, and that no other nation can justly claim the right to have

her nationals admitted to such territory. Why is it necessary to insert in a treaty of arbitration the principles of international law which must necessarily guide the action of an arbitral tribunal? If so, then every treaty must be an international code. But if the exception meant to exclude every question under a treaty affecting the admission of aliens, as it probably did, then it was most indefensible. If we have agreed to let in Englishmen or Frenchmen or Japanese or Chinese by treaty, on what ground ought we to evade or avoid the effect of the plighted faith of the nation to do so? Why should we be afraid to have our promises in this regard construed by an impartial tribunal? In other words, is not this a reservation of a right to violate our own plighted faith imposed by the Senate as a condition of its concurrence in the treaties? Was not the character of this condition a sufficient reason

for the executive to refuse to ask the other powers to consent to it?

The second condition of exclusion is very like the first. It eliminates from arbitration any question of the admission of aliens to the educational institutions of the several States. We have made treaties in which we have agreed that the children of aliens resident in this country may enjoy the educational advantages of the children of the citizens of the States in which they live. Now, this condition was an attempt to reserve from arbitration the judgment of a high tribunal upon the question whether we should comply with our treaty obligations in that regard. Why shouldn't we? If we make the treaty, why shouldn't we fulfil it? What is the object of making a treaty if it is not to perform it? If there were not a treaty giving the right to the children of aliens to take advantage of our educational privileges, inter-

national law would impose no obligation on our government, or on the State governments either, to furnish such privileges.

The third exclusion was of any question of "the territorial integrity of the several States or of the United States." Well, suppose a question of boundary had arisen and the issue was whether land claimed by a State or the United States under a previous treaty belonged to us or belonged to the other country, why should it not be made the subject of arbitration? Didn't we arbitrate the Alaska boundary? If we have somebody else's land, if it does not belong to us and a correct construction of the treaty shows that it does not belong to us, what objection is there to our parting with it under a judgment of the court?

The fourth class of questions excluded was of the alleged indebtedness or mon-

eyed obligation of any State of the United States. I agree that a sovereign State is not obliged to allow a suit against herself by any citizen or any individual, and that immunity from such a suit is one of the attributes of sovereignty. But the very object of international arbitrations and of general treaties to provide them is to do away with such immunity as between the parties. The commonest form of litigated questions in an international arbitration is a question of liability of a debt of one of the parties to the other.

Why should the indebtedness of the separate States be excluded in an arbitration by the United States with foreign countries? The United States is the representative of the States. Under the Constitution the United States acts for and represents the whole country, States and all. The Federal Government is the only one the other nations know.

That was what our Constitution was intended to effect. If we are in favor of settling controversies between sovereignties by arbitration, in order to avoid war, the only way we can make our States parties to such arbitration is through the National Government. It is said that the United States is not liable internationally for the debts of the States. That may or may not be true, but if it is not liable, then the arbitral tribunal may say so. If it is liable in international law then it should pay the debts of the States and it would have a right of action against the States, which it might enforce because it has the right to sue a State. Why should the sovereign States of our nation be represented as complainants by our central government in arbitration and not be made defendants through the same representation? Even the Senate did not attempt to exclude debts of the United States from

such arbitration. Why should the debts of the States be excluded? Of course, the treaties only affected controversies thereafter arising, so that past indebtedness was not included within their first clause. I am not at all sure that it would not be a very wholesome arrangement to fix some responsibility upon the States and to give them more motive than they have had in the past to avoid repudiation of their just obligations. The necessary exclusion of such indebtedness from questions that might be arbitrated seemed to me to be both unnecessary and improper.

The final exclusion was that the subject-matter of arbitration should not include any question dependent upon or involving the maintenance of the traditional attitude of the United States concerning American questions commonly described as the Monroe Doctrine or other purely governmental policy. John

Bassett Moore, late counsellor to the Department of State, and an international lawyer of profound ability and acumen, pointed out that the Monroe Doctrine, or other governmental policy of like character, could not be made the subject of arbitration under the general clause of justiciable questions to be settled on principles of law or equity, and that no exception was necessary. I did not have the slightest objection, however, to including such a restriction in the ratification of the treaty, and, had the conditions been limited to it, I would have attempted to induce France and England to consent to it. They had consented to it in other treaties, and I presume they would have done so here. Had this been the only condition imposed by the Senate, I believe the treaties might have gone through. Senator Root and Senator Cullom urged the confirmation of the treaties with only this condition, and

Senator Burton was in favor of concurring in the treaties as they were presented, and so was Senator Raynor; but Senator Lodge and Senator Bacon and the majority of the Committee on Foreign Relations took the view that in some way or other there was an unlawful delegation of the treaty-making power to a judicial tribunal appointed to construe a treaty and determine its application to particular facts.

A fair argument against the wisdom and justice of the conditions that the Senate of the United States insisted upon in its concurrence in the treaties is the fact that England and France imposed no such conditions, and their interests were just as much at stake as ours in the making and performance of the treaties. To this Senator Lodge answers that we have greatly more interests than they have to be affected by arbitration. I confess I do not understand the force

of his argument. The border between Canada and ourselves is one of four thousand miles, and there are just as many legal questions affecting Canada as the United States, and the questions that affect Canada affect Great Britain. We have many questions with France and with Great Britain directly. Indeed, we have as many with them as they have with us, and, if they are willing to submit matters to arbitration, why shouldn't we?

With deference to those who oppose these treaties I must be allowed to say that the real reason for defeating them was an unwillingness to assent to the principle of arbitration without knowing something in advance of whether we were going to win or lose. That spirit is not one that will promote the cause of arbitration.

I cannot say how much good the signing of the treaties did. Had they gone

through, I believe they would have been beneficial in the cause of peace. The agitation in their favor sowed some seed in the minds of the American people that may sprout and grow into useful plants; but, however this may be, those of us who believe in arbitration as the means of bringing about a general arbitral court which shall settle all issues between nations capable of judicial solution must continue the struggle, because it is right and its success will measure the progress of civilization.

I have been criticised for not going ahead with the treaty as provided by the Senate's proposed amendments, and I am quite willing to admit that there is room for discussion upon that point. I can only say why I did not. I was anxious to make a substantial step forward in the matter of arbitration treaties. I was anxious to give a model to the world of a treaty that meant something in the

matter of arbitration. A treaty grid-ironed with such specific and numerous conditions as the Senate imposed, and emasculated by striking out its really binding feature, would not offer to the world such evidence of progress as to encourage the making of similar treaties between other countries. Of course, neither with England nor with France was there need for such a general arbitration treaty. It is hardly conceivable, when we consider the respective relations between the two countries and ourselves, that any difference could arise which would not be settled by arbitration. Therefore, the mere fact of making a treaty of arbitration with either had little practical or intrinsic importance upon the issues likely to arise between us and them. The treaties were important only as an encouragement to other nations in the settlement of their differences. Such a treaty, if really comprehensive, would

have been thus useful and influential. As mutilated by the Senate, it seemed to me it would not effect any helpful result.

The discussion by senators of this question shows that many of them thought that such a proposition as that which I submitted to the Senate would in some way minimize the importance of the Senate in treaty making. Every senator alluded to the fact that in the constitutional convention Mr. Madison proposed that the Senate should make the treaties of the government, but that ultimately it was thought better to give the President the initiation and require a concurrence of the Senate by two thirds in treaties. Now, I am the last one to seek to minimize the importance of the Senate in either the treaty-making power or as a co-ordinate branch of the legislature. I regard the Senate as one of the most important and valuable fea-

tures of the government. With the tenure of six years for each senator, with the equal representation for the large and small States, it furnishes a check against too rapid and radical action. It has served the country well in times past, and will, I doubt not, continue to be of the utmost benefit in keeping the course of our government along safely progressive lines. What ought to be done by arbitration treaties is to bind the President, the Senate, and the country to abide by the judgment of an impartial tribunal in as many cases of international difference as possible.

Mr. Bryan is now engaged in making a number of treaties which will facilitate inquiry and investigation and advisory report into differences of nations before war comes, and which are so framed as to delay hostilities though they do not provide for arbitration. I am glad that such treaties are being made. I think

that the preparation of such a report will furnish useful delay while it will stimulate the negotiation of a settlement. Of course, the step is a small one, but as far as it goes it helps. The truth is that the provision with respect to the postponement of a year in the general arbitration treaties with France and Great Britain, which I have been discussing, was suggested to me by Mr. Bryan himself, though the provision for investigation and report was taken from The Hague conventions.

The ideal that I would aim at is an arbitral court in which any nation could make complaint against any other nation, and if the complaint is found by the court to be within its jurisdiction, the nation complained against should be summoned, the issue framed by pleadings, and the matter disposed of by judgment. It would, perhaps, sometimes require an international police force to carry out the judgment, but the public opinion of

nations would accomplish much. With such a system we could count on a gradual abolishment of armaments and a feeling of the same kind of security that the United States and Canada have to-day which makes armaments and navies on our northern border entirely unnecessary.

CHAPTER IV

EXPERIMENTS IN FEDERATION FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

The federative trend in international affairs has a distinct bearing upon the movement toward universal peace, although, of course, the federative trend has been more manifest in the formation of governments than in its effect upon the settlement of international disputes. In respect to the formation of governments this trend is the tendency, on the part of peoples under independent sovereign governments fearing foreign aggression and wishing to avoid difficulties with their neighbors, to associate themselves with

their neighbors in the establishment of a common and central agency of government to which each is to delegate and convey part of its sovereignty. The control thus delegated usually covers foreign relations and the making of war and peace, and sometimes a part of the jurisdiction of internal matters. Whether the delegation of power and the structure upon which the federation is founded includes a formal means of settling differences between the members of the confederation or not, it incidentally and necessarily has this effect. We may well emphasize the importance of federation in bringing about world peace and the utility of studying the historical instances of its application as a model for a plan by which independent powers shall consent to abide the judgment in proper cases of a great, permanent, impartial international court of skilled and just judges. The subject of this chapter was sug-

gested by Mr. Holt, the editor of *The Independent* and one of the strongest advocates of world peace that I know. He thought an examination of historical precedent and the application of it to the problem he has so much at heart might be useful.

The adoption of the principle of federation in political government dates far back in Grecian history. Its best example is found in the Achaian League in the Peloponnesus of Greece, which, beginning in the small territory of Achaia, gradually grew in extent of constituent cities until it included most of the Peloponnesian cities and a number of others in the northern peninsula. In its second and more perfect form, it was reorganized in 280 B. C. and lasted about one hundred and twenty-five years. It was formed for the purpose of resisting the dominion of Macedon. The members of it were independent municipal

sovereignties and, in coming into the league, delegated to the executive and legislative authorities of the league, whom they chose, control over their foreign relations and the making of war and of peace. The historian Freeman finds many similarities between our Federal Constitution and that of the Achaian League. He points out the fact that Hamilton and Madison, although they studied Grecian history, were uninformed as to what he thinks the remarkable resemblance between the federal structure of government in this league and that which those statesmen did much to frame in our fundamental law of 1789. They were misled, he says, through the inaccuracies of a French historian, and instead of looking to the Achaian League, as they well might have done, they derived comfort and suggestion from erroneous accounts of the nature of the Amphictyonic League as a federal council of Greece. He

points out, and other historians sustain him in the view, that the Amphictyonic League was nothing but an association of the various tribes of Greece, which, through their tribal representatives, met in a council at Delphi, where was the Oracle of Apollo, and there, in the interest of religion, adopted measures looking to its promotion and the preservation of the shrine. It was really nothing more than an ecclesiastical synod. Like not a few religious conferences, however, it occasionally adopted resolutions that touched matters that were hardly within its religious jurisdiction. It undoubtedly at times had some political influence through its religious importance. The kings of Macedon subsequently used it as an instrumentality in the politics of Greece, but it has no bearing, as Hamilton and Madison thought it did, upon the use of the federative principle in the formation of governments. Mr. Freeman

says: "It is clear that Hamilton and Madison knew hardly anything more of Grecian history than what they had picked from the 'Observations' of the Abbé Mably. But it is no less clear that they were incomparably better qualified to understand and apply what they did know."

The constitution of the Achaian League did not provide for a federal tribunal, and I cannot find in the somewhat lengthy volume of Mr. Freeman any reference whatever to judicial matters in the history of federation in Greece and Rome. Mr. Freeman says that it was the custom among Grecian cities, when the international rights of one were broken by another, to submit the issue to the arbitrament of a third city. Probably in this way the differences between the members of the Achaian Federation were settled when they arose. But it is a thing that we must realize, though it is

a little hard to do so, that courts and judges as such—having only judicial functions—are a comparatively modern invention. The Book of Judges in the Old Testament suggests the idea that they must have had judges in Israel, but while these judges heard judicial controversies, as we know, they were really civil patriarchal rulers who exercised executive and legislative as well as judicial powers.

Even in the golden era of the Roman Empire, when the rule of law was being established by law-writers and jurisconsults, in the four centuries before the Code of Justinian, there were no judges as such. There was an executive officer, called the Prætor, whose business it was to execute the law. He was not generally a lawyer. When he had a case in the execution of the law that involved a judicial inquiry he formulated his case and submitted it to a referee, who was

not necessarily a jurisconsult or learned in the law. He was called a Judex, and from the title given him we get the name of judge. The Prætor was elected every year, so that, in spite of the great debt that we owe to republican and imperial Rome for the supremacy that they gave to law and its administration and the symmetry that they gave to jurisprudence, we cannot say that we owe to them a judicial system of permanent, learned, and independent courts. For that we must look to the history of Anglo-Saxon civil liberty, because it is in English history that we find the ultimate division of governmental functions between the executive and legislative on the one hand and the judicial on the other. The term "court" is a late word derived from the fact that the hearing of the tribunal was heard in a court or courtyard. This failure to recognize a difference between the executive, leg-

islative, and judicial functions manifests itself even now when we come to consider international relations and tribunals for the settlement of international disputes. I shall refer to this later. After the ancient local proprietary or manorial courts lost their jurisdiction, the King of England in council or in Parliament became the seat of all governmental power, executive, legislative, and judicial. Parliament was not only a legislative body but it was a court. Lords and Commons met originally in one body. Now the two bodies are separated; the judicial function is still exercised by the House of Lords. The King sat in his own court, which gave it the name of "King's Court." Edward IV was the last king to do so in person. Then the King delegated this judicial duty to his justiciaries, who held the King's Court, and attended the King wherever he went. This caused great in-

convenience in private cases, and, finally, in the Magna Charta that was extorted from King John by the Barons at Runnymede, that monarch agreed that the assizes should be held at certain times in every county of his realm by his judges, so that individuals might not be put to the trouble of following the King about in his travels in order to get justice. The use which the Stuart kings made of the judges to sustain their arbitrary course led to a change in their tenure after the revolution of 1688 and the Bill of Rights, so that early in the reign of Queen Anne they ceased to hold office at the pleasure or during the life of the King and became judges for life and independent of his control. We have thus inherited our conception that a court is a body that decides cases according to the law and the fact, without influence by the executive or even the legislative power except as the legislature enacts positive

law and the court construes and enforces it as a uniform rule of conduct.

No such idea of a judicial tribunal, set apart and independent, prevailed either in Greece or in Rome, or during the Middle Ages, or during the Holy Roman Empire. It is a later conception in continental countries. But it is most important that this idea of absolute justice and of having judges who in giving judgment are impartial and independent of political policy or legislative direction, should be recognized in our international relations.

It is true that the Progressive party and its leaders are now seeking to destroy this conception, to take away the independence of the judiciary, to remove the idea of absolute justice which the independence of the judiciary is supposed to secure, and to mingle in its administration of specific cases the desire of the sovereign electorate. Heretofore we have thought that in tracing back the

history of our liberties from Magna Charta through the Petition of Right and the Bill of Rights, the Declaration of Independence, which itself insists on the independence of the judiciary, and the Federal Constitution we have had something to be grateful for in the judicial system which we have inherited. This seems a far cry from the Achaian League and the federative trend of government, but I think I can make it seem relevant before I get through.

We find in the Grecian example the fact that men began to realize that while a Grecian city was capable of furnishing a useful and happiness-giving government, yet when it came to resist the aggressions of a stronger neighbor the people of the city must look for aid among those who were similarly circumstanced and yield something of their sovereignties to one joint federal authority for their protection. There have been in

history since that time many instances of federations. The Holy Roman Empire, theoretically and in the sonorous titles of the Emperor, began with Julius Cæsar and lasted until Napoleon's time. It presented at stages in its history an important phase of the federative principle for our present use. After the breaking up of the real Roman Empire by many different barbarian invasions and migrations, and after the nationalizing spirit became stronger and before the Holy Roman Empire lost all its power, there were heated discussions as to the relation of the Emperor to the government of men. The prevailing theory was that all secular government came from God through the people to the Emperor, and while kingdoms and dukedoms and principalities and the electorates whose chiefs elected the Emperor exercised independent government in their respective jurisdictions, they all seemed theoretically to

concede their subordination to the divine right of the Emperor in secular government. He was called the Emperor of Peace, and one of his recognized duties and powers was to keep the kings and dukes and other potentates who were under him from war. He was generally unsuccessful, but the high character of this duty on his part and the conception which the statement of the duty showed to be in the minds of men are interesting and significant. While it cannot be said that the Holy Roman Empire was the result of a federation, because in theory the Emperor created Kings and princes, nevertheless, as national life developed into different sovereignties, the only relation that they had to the Emperor was a result akin to what would have happened had they been separate entities and had then united in a federation for purposes that the maintenance of the imperial power continued to serve. Mr. Bryce, in his history of the

Holy Roman Empire, speaking of this feature of the empire, says:

> With feudal rights no longer enforceable, and removed, except in his patrimonial lands, from direct contact with the subject, the Emperor was not, as heretofore, conspicuously a German and a feudal king, and occupied an ideal position less marred by the incongruous accidents of birth and training, of national and dynastic interests.
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> To that position three cardinal duties were attached. He who held it must typify spiritual unity, must preserve peace, must be a fountain of that by which alone among imperfect men peace is preserved and restored —law and justice. . . . And he was, therefore, above all things, claiming, indeed, to be upon earth the representative of the Prince of Peace, bound to listen to complaints and to redress the injuries inflicted by sovereigns or peoples upon each other; to punish offenders against the public order of Christendom; to maintain through the world, looking down as from a serene height upon the schemes and quarrels of meaner potentates, that supreme good without which neither arts or letters, nor the gentler virtues of life, can rise and flourish. The mediæval empire was in its essence what its modern

imitators have sometimes professed themselves—the Empire of Peace; the oldest and noblest title of its head was "Imperator pacificus." And, that he might be the peacemaker, he must be the expounder of justice and the author of its concrete embodiment, positive law; chief legislator and supreme judge of appeal, like his predecessor, the compiler of the Corpus Juris, the one and only source of all legitimate authority.

The result of this view of the position of the Holy Roman Empire in the Middle Ages and later on is seen in a number of conceptions published in those dark centuries. They are referred to by Mr. Thomas Willing Balch in a paper on "The Advance of International Peace through Legal and Judicial Means," which he read at the 1912 meeting of the Society for the Judicial Settlement of International Disputes at Washington. In 1306 a French barrister, Pierre Du-Bois, in a treatise entitled "De Recuperatione Terre Sancte," urged that the Catholic states of Europe should form

an alliance, with the King of France at their head, in order to secure peace among themselves. Should trouble arise between any members of the proposed alliance, DuBois urged that their difference be settled by a quasi-court appointed *ad hoc* and composed of six members, and consisting of three ecclesiastics and "three others from both parties." In each case the Pope was to be appealed to to review the decision. In 1461 King Podiebrad of Bohemia, adopting the plans of Antoine Marini, his chancellor, negotiated with other sovereigns for the establishment of a federal state which was to have a federal congress composed of ambassadors to sit at Bâle. And Henry IV proposed, at the suggestion of his minister, the Duke of Sully, what was called the Great Design. Though this was in the form of a federation to avoid war, it was said to be not a genuine proposal of universal peace but

a plan to give France the leadership of Europe. Nevertheless, it seems to have suggested a good many real plans for the accomplishment of its avowed purpose. In 1623 a Parisian monk, Emeric Cruce, proposed that all sovereignties of the world should send ambassadors to some city like Venice, and that when two sovereign powers disagreed, the ambassadors should plead the cause of their respective sovereigns before the other assembled ambassadors, who should decide the issue, and the judgment was to be enforced by the combined power of the sovereignties represented in the court. Within two years after the publication of this plan, Grotius, in his epoch-making work on the "Law of War and Peace," urged upon sovereigns the convening of congresses for peaceable settlement of international disputes.

For our purpose, perhaps, the most interesting instance of federation other

than that of our own country was the Swiss Republic. This federation is remarkable in that it was organized in the thirteenth century and has continued until to-day. It illustrates a continuous union of people who speak three different languages, in the very centre of Europe, and therefore in the centre of a continental battle-ground. It was doubtless the result of the same desire for protection against foreign aggression that prompted the Achaian League, but it lasted longer. While the Swiss people differ in language they resemble each other in character, and there was a national spirit among them, early developed, that insisted on local self-government but on united action against invaders. Doctor Scott, in an interesting address before the last annual meeting of the Society for the Judicial Settlement of International Disputes, invited attention to the precedent of the Swiss Republic in the development of the

federation principle into a national court after centuries of association, and he quotes the following from M. Lardy, a Swiss diplomat, who presided in an arbitration between Russia and Turkey, 1911:

Is it improper for me to state that more than six centuries have passed since the first of August, 1291, when the Swiss burghers signed their first treaty of alliance on the shore of the Lake of the Four Cantons, at the foot of our snow-clad Alps? On that memorable day which the Swiss people annually celebrate with bonfires on every mountain top, while all the church-bells call upon the Almighty to protect the Fatherland, the Confederate Cantons made an arbitral pact with each other, binding themselves to submit their differences to the more prudent inhabitants (prudentiores) of their valleys and creating the force needed to assure the execution of the award. For centuries Switzerland developed under the protection of arbitration, until the day came when it was enabled to commit to its federal tribunal the decision of a large number of disputes of a public nature and to intrust the rights and liberties of its citizens to the federal tribunal. Will the court of The

Hague some day become the federal tribunal of the nations? In Switzerland, small as it is, centuries were required to create a permanent federal tribunal and to secure its acceptance by public opinion. It is the part of wisdom to believe that many years must elapse before the basis of an agreement be found which will assure the independence of the various states and guarantee the moral heritage of every people in the universal concert of nations.

It is remarkable that this system of arbitration, begun six hundred years ago, did not develop into a federal Supreme Court until 1845. We may sincerely hope that it will not take six centuries for the court of arbitration, established at the first Hague Conference, to develop into the arbitral court proposed in the second Hague Conference.

The next federation in point of time for our consideration is that which we of the United States have offered as a model to the world. I pass it by, for the present, to come to some more recent. We

find in the relation of the Privy Council of England to three great governments that are an important part of the British Empire, instances of the trend toward a federal court whose authority and whose function are closely akin to what an international court should exercise. I refer to Canada, Australia, and South Africa. The compromises that were made and the statesmanship and patriotism that were shown in reaching an agreement for federation of the great English and French provinces in one Dominion of Canada, owning a half continent and containing now eight millions of people, form a notable history that parallels the struggle our ancestors made to frame and ratify our Constitution. Indeed, the framers of the Canadian federation profited much by the lessons from our history. The same thing is true of the formation of the Australian federation, with five millions of people, which in some

respects more resembles ours than does Canada. The South African federation, the last one formed, under the British Empire, has less of the federative principle and more of the direct government than either of the other two, or of our own.

But in all these federations there is a Supreme Court which has the power of settling the questions arising under federation law and determining the questions which may arise between the members of the federation. In each, these members are great states quite like our own, but called provinces in Canada, which carry on their local self-governments and exercise an autonomy differing somewhat from that exercised by our States, but all illustrating, in a most satisfactory way, the value of the federative principle, by which the idiosyncrasies of locality and local tradition are given full scope in the provincial governments, while the general law of the federation, as a whole, is left

to the federative parliament, courts, and executive to prescribe, interpret, and execute. Each has a supreme court which passes on the quasi-international relations between the members that go to make up the federation. And then what is even more important and more significant of the possibilities of a world federation is the judicial appeal that may be taken from the supreme courts of these Federations to the Privy Council sitting in England that acts as a supreme tribunal for all the quasi-independent governments of the entire empire. Sir Charles Fitzpatrick, the Chief Justice of Canada, has been invited to sit in the Privy Council in the coming summer in a cause concerning the boundary between Newfoundland (which is a separate colony of Great Britain) and the Dominion of Canada. In the decision of such a case it is inevitable that the high tribunal will administer the general principles of international law.

Coming now to our own government and its organization, it is entirely unnecessary for me to go into the general history of the organization of the original federation, the history of the adoption of the Articles of Confederation after the Declaration of Independence, or the organization of our government under our present Constitution into a more compact union, making us a nation before the world.

Under the Articles of Confederation, Congress was made the tribunal to settle controversies and differences arising between the independent sovereign States that made up the Confederation. The name "Congress" indicated the character of the body. Congress, in the language of diplomacy, was a term applied to a meeting of sovereigns or of their ambassadors for international action. Congress under the Federation was called upon to settle at least one State contro-

versy. That was the dispute between Pennsylvania and Connecticut as to the title of lands in the Wyoming Valley now in Pennsylvania. Congress selected from the different States a list of men from whom the parties were enabled to select a certain number to constitute the court. The court sat at Trenton, heard evidence for forty days, and decided the controversy in favor of Pennsylvania, and in this judgment the State of Connecticut acquiesced.

In the Constitution of 1789 the judicial power of the United States was extended to controversies between two States and between a State and a foreign state. And these controversies were to be heard as original cases before the Supreme Court. The Constitution also extended the judicial power of the United States to any suit in which the United States was a party. This enables the United States to sue any State, and

the fact that the State is a party gives original jurisdiction to the Supreme Court to consider the cause. One such case has been tried growing out of a dispute in a boundary that involved the title of the State of Texas to Greer County. The question was whether Greer County belonged to the United States or whether it was a part of Texas. The Supreme Court heard the case and decided in favor of the United States, and Greer County subsequently became part of the new State of Oklahoma. It is unnecessary to enumerate the number of cases in which the Supreme Court has been called upon to adjudicate between the sovereign States and to enforce international law in their controversies. Mr. Wickersham, when attorney-general, reviewed them at length in an interesting paper read by him before the 1912 meeting of the Society for Judicial Settlement of International Disputes. In my last chapter I referred

to the case of Kansas v. Colorado, 185 U. S. 146, from the language of Chief Justice Fuller's opinion in which the term "justiciable" suggested its use in the general arbitration treaties to describe the kind of controversies which might properly be arbitrated. In that case the chief justice said:

> Sitting, as it were, as an international as well as a domestic tribunal, we apply federal law, State law, and international law, as the exigencies of the particular case may demand.

In the same case, reported again in 206 U. S. 46, 97, Mr. Justice Brewer, delivering the opinion of the court, says:

> As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in

this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In the Paquete Habana, 175 U. S. 677, 700, Mr. Justice Gray declared:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

Mr. Wickersham calls attention to the fact that very few instances have occurred in which a foreign state has availed itself of the privilege of suing a State of the United States in the Supreme Court, but he notes a case in which I had the honor to be of counsel, entitled "In re Cooper," 138 U. S. 404, in which, with the knowledge and approval of the

Imperial Government of Great Britain and in the name of the attorney-general for the Dominion of Canada, an application was made to the Supreme Court to issue a writ of prohibition to prevent an admiralty court in Alaska from selling under a decree of forfeiture a Canadian schooner for alleged violation of the statute of the United States against pelagic sealing, on the ground that this sealing was done beyond the jurisdiction of the government of the United States in the open seas. This was a very emphatic testimonial to the confidence which the British Government had in our Supreme Court, and the chief justice acknowledged it in the following language:

In this case—Her Britannic Majesty's attorney-general of Canada has presented, with the knowledge and approval of the imperial Government of Great Britain, a suggestion on behalf of the claimant. He represents no property interest in the vessel, as

is sometimes done by consuls, but only a public political interest. We are not insensible to the courtesy implied in the willingness thus manifested that this court should proceed to a decision on the main question argued for the petitioner; nor do we permit ourselves to doubt that under such circumstances the decision would receive all the consideration that the utmost good faith would require; but it is very clear that, presented as a political question merely, it would not fall within our province to determine it. We allude to this in passing, but not at all with the intention of indicating that the suggestion itself diminishes the private rights of the claimant in any degree. (143 U. S. 503.)

This international recognition of our own Federal court brings us to the larger projects for world federation for judicial purposes which centre in The Hague.

The federation in international matters took definite form in the invitation issued by the Emperor of Russia to hold the First Hague Conference. At that conference an agreement was entered into by the many nations that took part

in it, embracing all the important nations of the world, providing a so-called permanent court of arbitration for the settlement of international disputes. In a strict sense it is not permanent, nor is it a court. The agreement does invite each one of the signatory powers to furnish a list of competent persons from whom parties seeking the form of procedure provided may select arbitrators. But it might better be called a permanent plan and form of procedure for temporary arbitrations in the settlement of international disputes.

The Second Conference, however, made a great advance over this. It adopted a form for a permanent international prize court and framed a definite organization of that court. It provided that the judges appointed by the following contracting parties, Germany, the United States of America, Austria, France, Great Britain, Italy, Japan, and Russia,

should always be summoned to sit, while judges appointed by the other contracting powers should sit in rotation as shown in the table annexed to the convention, and the same judge might be appointed by several of the powers. It provided for an appeal from the existing prize courts of any nation to this international prize court and bound the powers to abide by the result of the appeal. Of course, services of a prize court are called into requisition only during naval warfare. The prize jurisdiction is part of the system of legal piracy that continues to be recognized as within civilized warfare, by which private property of the citizens of an enemy, carried in trading vessels under the flag of the enemy, though harmless and unarmed, nevertheless may be captured as lawful prize and sold for the benefit of the officers and men of the capturing war-vessel. By the present rules of naval warfare, the

prize has to be taken into a port of the country of the capturer, and there, in a proceeding before an admiralty court sitting as a prize court, the vessel and her cargo are adjudged lawful prize and sold and the proceeds distributed. It was impossible under our Constitution for us to agree to an appeal from the decision of our prize courts, whether district or supreme, to an international prize court, but instead of that we agreed to have the cause submitted to the international prize court, and if the decision of the Supreme Court or the local court was found to be wrong, to allow the international prize court to adjudge damages against the United States sufficient to compensate the person injured by the decision. Such a procedure had been foreshadowed in several cases in which the judgments of the Supreme Court in prize appeals had been held to be erroneous by an international arbi-

tration, and an award on the basis of the arbitration had been made and paid by Congress. The international-prize-court provisions, although agreed upon in detail at The Hague Conference, have not been embodied in a convention between the powers because of a difficulty in settling what the law of prize is. In order to do this, a conference of the powers assembled in London and agreed to what was known as the Declaration of London, formulating a code of rules regulating the rights of neutrals and belligerents with respect to neutral commerce. I am sorry to say that England has not consented to that declaration, and her failure to do so has thus far made impossible the consummation of the very noteworthy plan for an international court of prize.

But the international court of prize is important not for itself but because of what has grown out of it, to wit, the recommendation of the Second Con-

ference of The Hague that we shall have an arbitral court of justice permanent in its membership, with paid members, who shall take no part except as judges in any international dispute. This has failed of complete concurrence by all the powers interested, because every power wished to have a judge on this court, and, as there are forty-six signatory powers, such a court is impossible. Why they might not make the same arrangement that was made in the international prize court as to membership, is not quite clear. Probably a good many of the powers were not interested in naval warfare, and therefore not in the decisions of an international prize court, while they might be in the decisions of an international court of more general jurisdiction.

The recommendation of this Second Hague Conference of both courts, however, is most gratifying, and if followed will constitute a long step forward in the

mode of settling international disputes, closely approximating that of settling controversies in our domestic tribunals. Attention has been called by a number of persons who have followed closely international arbitration, and who well understand municipal judicial systems, notably Mr. Knox and Mr. Root, to the difference between international arbitration as it has been practised and the result of the submission of causes to a domestic court. The tribunal of arbitration has usually been composed of representatives from each party and an umpire or umpires from other countries. The decision resulting has too often been not a clean judgment of the facts and the law on the merits, but it has been a compromise with the hope that each party may acquiesce in the suggestion of settlement. It is really a continuation of diplomatic effort to reach a settlement satisfactory to both parties with as much

gentle pressure as may be. The presence on the court of representatives of each party is calculated to bring about such a result. They fall into the attitude not of judges but of partisan claimants in the consultations of the tribunal; and apparently it is not expected that they will ever consent, or make themselves parties, to a judgment adverse to the serious claims of the country which they are supposed to represent. I do not think it is too much to say that this has generally been the continental view. With English and American jurists seated on the tribunal, exceptions have been known. They have generally approached questions presented to them as members of a tribunal in the same way in which they would approach questions presented to them as judges in a municipal court. Thus, in the issue between Great Britain and the United States as to the Alaskan boundary, Lord Chief Justice Alverston

sat as one of the arbitrators and voted to decide the main question in favor of the United States. His attitude was very severely criticised, but he justified himself as an English judge, and said if he was to be selected as a judge, he expected to act as a judge. So, in the seals controversy, Mr. Justice Harlan, while concurring in the claim of the United States in one aspect, voted to reject the claim of territorial jurisdiction made on behalf of the United States and earlier set forth at great length by Mr. Blaine when secretary of state.

But it may be asked why this method of compromise in arbitrations is not the best way of settling international disputes. Does it not prevent the feeling of bitterness that more drastic judgments might create in the minds of the defeated nations and thus will promote peace and good-will? I think not. A nation which has a good cause, or thinks it has, will hesi-

tate to submit the cause to a tribunal that will in practice and by custom abate part of the claim, not on grounds of justice, but in order to satisfy the natural partisan feeling of the opposing party. It is a fearless, clear-headed, justice-loving court that will command the confidence of the nations and will induce the submission of claims to it. A permanent international court sitting with a permanent membership, and hearing case after case, will acquire not only a facility of decision but also will acquire the joint judicial spirit in approaching all kinds of questions. We cannot expect that in the beginning we shall have perfect results. We must anticipate the presence of prejudice in the court, but the longer that it exists and the more cases it has to decide and the more its decisions form a consistent system of law, the more confident may we be that it will grow into a great court for the consideration of international ques-

tions having the respect of the civilized world.

The independence of the English and American judiciary has created—I think it may be said without invidious distinction—a higher standard of judicial impartiality because of the historical growth of our courts into their present attitude than prevails in any other countries, and, therefore, even in a case between England and the United States, I would quite as willingly submit the case to three English judges and two American judges sitting in a court of five as I would to a court consisting wholly of jurists from other countries.

It is very clear that if we can secure any system for a permanent court which shall sit to hear such cases as are presented to it, the number of cases which will be submitted and the decisions arising therefrom will be of sufficient influence to induce the submis-

sion of more and more cases to such an impartial tribunal as it will prove to be. The formation of the court is a most important step, because, with the cases that are submitted to it, it will become an object-lesson. Time and time again the situation will arise when a government by public opinion of the world will be forced into some other method than defiant refusal to meet an equitable claim, and then, when such a court exists, it will propose submission to it of the pending question in order to escape from a more embarrassing solution.

With the formation of The Hague Court of Arbitral Justice, as recommended by the Second Hague Conference, for the consideration of all questions arising between the nations of the world, I shall look forward with confident hope to the signing within a few decades, or a half-century (for what is such a period in the achievement of such a triumph

of righteousness?), of a general treaty or convention by all the great powers, in which they shall agree to submit all justiciable controversies to this tribunal. I hope that they will make the convention in the form of a federal agreement by which this court shall be recognized as a federal court, with the right on the part of any nation aggrieved against another nation to bring its complaint into the court, have the court determine its jurisdiction of the complaint in accord with the definition of its jurisdiction in the convention, and then summon the offending nation and require an answer, and after hearing enter judgment. Why do I hope for this? Am I overenthusiastic? It may take time, I admit, but not so many years as scoffers suppose.

The usefulness of examining history with reference to the federative trend of government is to show that federation is a normal and natural method of taking care

of and settling, in an effective way, justiciable questions between sovereignties. The theoretical power and duty of adjustment of differences between nations by the Holy Roman Empire induced great conceptions such as I have described at a time when war was a normal condition between nations and peace was the exception. It was such a conception that led to the urgent recommendation of that great international lawgiver, Grotius. The growth of arbitration into a federal court in the history of the Swiss Republic is another instance of the natural development from independence into federation, and then from negotiation and arbitration into a federal court for settling differences between the federated sovereignties. The international jurisdiction of the Supreme Court of the United States is another most significant model and points the natural historical way of settling international disputes both in the-

ory and in practice. The federative principle in the organization of the three great English federations, Canada, Australia, and South Africa, the establishment of a supreme court in each federation to decide between the members, and the real character of the Privy Council in England in settling the judicial questions between members of the British Empire, all point more and more nearly to the goal we seek of a world federation court.

But it is said: "If this federative trend of government has existed since Grecian times, and was recognized in the Middle Ages, in the days of Charlemagne and Henry the Fowler and Frederick Barbarossa, why has it failed in the long time which has elapsed since then to develop into the court you seek? Why may you expect now more rapid progress after centuries of delay?" One reason is the success of the use of federal courts in settling

differences really inter-sovereign, if I may coin a word, as seen in these modern federal governments, and a further reason is that the whole world is aroused to the advantage of peace, as it never has been before. Nations of the world are growing closer and closer to each other. Facility of transportation and facility of communication have developed a knowledge and an interest among the people of one country in the doings of the people of another that was never known before. We follow with close attention the Ulster controversy, the political tragedy in France, the trial involving the military conduct of army officers in Alsace, the Jewish persecution in Russia, the parliamentary proceedings in China, the overthrow of a party in the responsible parliamentary government of Japan. We may be sure that peoples of other countries, with equal facility, follow the important events in

this country. Money is being poured into the coffers of our missionary societies for the purpose of promoting Christian civilization throughout the Orient and in Africa to give us in those countries advance agents and pioneers representing altruism and the promotion of true religion. The united spirit of search for truth and the promotion of world brotherhood shown in the universities the world over, and the gradual forming of a world public opinion, of higher moral standards, all create an atmosphere in which we may be sure this federative trend in international matters will be fostered and encouraged to extend to the creation of a federal world court whose judgments nations will ultimately regard as binding in the same sense as those which domestic courts render.

But the query is made: "How will judgments of such a court be enforced; what will be the sanction for their execu-

tion?" I am very little concerned about that. After we have gotten the cases into court and decided and the judgments embodied in a solemn declaration of a court thus established, few nations will care to face the condemnation of international public opinion and disobey the judgment. When a judgment of that court is defied, it will be time enough to devise methods to prevent the recurrence of such an international breach of faith.

Undoubtedly when such a court is established, and a series of judgments have been delivered, these will constitute great and valuable additions to international law. The controversies will invite application of recognized principles to new facts, and the variation that new applications will involve will widen the law, and the court will be an authoritative source for its growth and development. It will be judge-made law, and the growth of the

international law will be as the common law has grown, adapting itself to new conditions and expanding on principles of morality and general equity.

It is, therefore, federation to the extent of a permanent international court that offers the solution of the problem of how to escape war, how to induce nations to give up the burden of armaments, and how to broaden and make certain our system of international law. It will be natural with a court thus established, and with the closer union that it will necessarily bring between the various powers of the earth, that congresses of nations shall be called at convenient periods, in which, by treaties, an international code may be adopted to meet the defects in accepted international law which the issues and judgments in the arbitral court may develop, and which the judicial discretion of such a tribunal

may not be broad enough to supply. Such a court and such a code will greatly promote justice in the world and the peace of nations.

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